TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 204.

ROBERT J. TRACY, PLAINTIFF IN ERROR,

vs.

ALBERT A. GINZBERG, INDIVIDUALLY AND AS TRUSTEE IN BANKRUPTCY OF H. C. LONG & COMPANY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED FEBRUARY 10, 1906.

(20,094.)

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1 UNITED STATES OF AMERICA, *ss.*:

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Robert J. Tracy, Plaintiff, and Albert A. Ginzberg, both as an individual and as trustee in bankruptcy of H. C. Long & Company, Defendant, in a bill in equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Robert J. Tracy as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the eighteenth day of January, in the year of our Lord one thousand nine hundred and six.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts,
Per BENJ. H. BRADLEE, *Deputy Clerk.*

Allowed by
MARCUS P. KNOWLTON, *C. J. S. J. C.*

2 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

And now, here, the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I, John Noble, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said Court this thirty-first day of January A. D. 1906.

[SEAL.] JOHN NOBLE, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

To all persons to whom these presents shall come, Greeting:

Know ye, that among the Records of our Supreme Judicial Court sitting at Boston in said County of Suffolk for the hearing of cases in Equity from the first day of January in the year of our Lord Nineteen Hundred and six, to the thirty-first day of December in said year, (both days inclusive), it is thus contained,—the following being the entire record in the case:

4 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. In Equity.

ROBERT J. TRACY, of New York, in the County and State of New York, Plaintiff,

v.

ALBERT A. GINZBERG, of Boston, in the County of Suffolk Aforesaid, Both as Individual and as He is Trustee in Bankruptcy of the Joint and Separate Estates of Herman C. Long and Frank A. Sanderson, Defendant.

Bill of Complaint.

1. Respectfully represents Robert J. Tracy, the plaintiff, that on the 23d day of December A. D. 1902 he sold the personal property situated at No. 24 Avery street in the said city of Boston, used in carrying on the hotel business at said No. 24 Avery street, to the bankrupts Long and Sanderson, and assigned to them the lease of the realty occupied by said hotel, and, as partial payment therefor, took back a mortgage on said personal property for the sum of seven thousand five hundred dollars ($7500), running to the James Everard's Breweries, a corporation organized under the laws of New York. That said mortgage covered not only a portion of the purchase price, but also the sum of three thousand dollars ($3000) in cash, which the plaintiff paid for a liquor license, which, on or about

said December 23, 1902, he procured to be assigned to the bankrupts Long and Sanderson, and to himself, as joint owners, and also the sum of one thousand four hundred dollars ($1400) in cash, which the plaintiff paid to the city of Boston as license fee for a liquor license, duly issued by the board of police of the city of Boston to the said Long and Sanderson, and to the plaintiff, and which license expired by limitation on the 1st day of May, 1903.

2. That in consideration of the advance, by the plaintiff's procurement, of the aforesaid sums of three thousand dollars ($3000), and one thousand four hundred dollars ($1400), the bankrupts Long and Sanderson, by an instrument under their hands and seals, dated December 23, 1902 (a copy of which is annexed marked A), assigned their right, title, and interest in and to said license to the plaintiff, and covenanted and agreed that all future applications for renewals of said license should be in the names of Long, Sanderson, and Tracy, and that upon such renewal being granted they would assign, transfer, and set over to the plaintiff their interest in such licenses.

3. That when the aforementioned license was about to expire, to wit, on the 24th day of April, 1903, the aforementioned bankrupts, Long and Sanderson, had not the money wherewith to pay in advance the fee for the renewal of the same for the year 1903-1904, and the plaintiff procured the said renewal fee of one thousand four hundred dollars ($1400), and paid it to the city of Boston, and thereupon a new first and fourth class license was issued by the board of police of the city of Boston to the bankrupts Long and Sanderson, and the plaintiff, to sell intoxicating liquors in the building situated at No. 24 Avery street in the city of Boston, which license the plaintiff took into his possession before the beginning of the bankruptcy proceedings, and now has in his possession, and prays leave to produce at the hearing.

4. That upon the payment of the said license fee for 1903-1904, the bankrupts Long and Sanderson, by an instrument under their hands and seals, dated April 24, 1903, assigned, transferred, and set over to the plaintiff their interest in said license, and further agreed to assign and set over to the plaintiff their interest in any renewals of said license, so long as they should be indebted to James Everard's Breweries (a copy of said instrument is annexed marked B), and the plaintiff says that said assignment was for a present and valuable consideration, and that by reason of said assignment he became the actual sole owner of said license.

5. And the plaintiff further says that the bankrupts Long and Sanderson were duly adjudicated such by the district court of the United States for Massachusetts, on their own petition, on the 23d day of July, 1903, and that at said time they were indebted largely to James Everard's Breweries, and are still indebted to James Everard's Breweries in excess of the sum of seven thousand dollars ($7000).

6. The plaintiff further shows that the number of first and fourth class licenses to sell liquors in Boston is limited by law, and that they are substantially all issued each year, so that a new license cannot

be issued until an old license is cancelled, and the plaintiff says that old licenses are of great value to persons who desire to engage in the liquor business in Boston, and that old licenses sell for from three thousand dollars ($3000) to five thousand dollars ($5000) to persons who present them for cancellation, together with an application for a new license to themselves, and that, because of the large surrender value of old licenses, and of the long-continued custom of
6 reissuing licenses to old holders until refused for cause, such licenses have been recognized by the courts of this commonwealth as property rights, and the powers of the board of police in dealing with them have been limited to the exercise of a sound discretion within the limits established by the laws of this commonwealth.

7. That notwithstanding the defendant, Ginzberg, had full knowledge of all these facts and of the plaintiff's rights, as set out herein, he wrongfully, and with intent to deprive the plaintiff of the valuable rights he had in said license, procured the board of police of the city of Boston, on or about the 1st day of April, 1904, to cancel the plaintiff's license without notice to him or hearing on any charge of violation of the terms of said license. And the plaintiff further alleges that he is informed and believes that the defendant, Ginzberg, with the aid and assistance of the police board of the city of Boston, prior to the cancellation of said license, assumed to sell the aforesaid license to some party unknown to the plaintiff for the sum of three thousand dollars ($3000) which sum he refuses to pay over to the plaintiff, but now has in his possession, either as an individual or as the trustee in bankruptcy of the aforesaid Long and Sanderson; and the plaintiff is further informed and believes that the said Ginzberg has collected from the city of Boston the sum of two hundred dollars ($200) as a rebate upon the plaintiff's license, which he fraudulently procured to be cancelled without notice to the plaintiff or hearing thereon.

8. And the plaintiff says that he has demanded an accounting from said Ginzberg for the money alleged to have been received by him, but that said Ginzberg refuses to account or pay over any sum to the plaintiff whatever.

9. The plaintiff further shows that said license never became an asset of the bankrupt estate and was not subject to the jurisdiction of the district court of the United States for Massachusetts, and that the defendant, Ginzberg, in all the matters complained of acted beyond his powers as trustee of said bankrupt estate, and without warrant of law has disposed of a valuable privilege belonging to the plaintiff, and has procured the destruction and cancellation of the plaintiff's valuable rights.

Wherefore the plaintiff prays,—

1. That the title of the plaintiff to the first and fourth class liquor license issued to Long, Sanderson, and Tracy to be used at the premises No. 24 Avery street, Boston, be established.

2. That the defendant, Ginzberg, be ordered to account for the sums received by him as the proceeds of the plaintiff's license, wrongfully disposed of by him, and that he be ordered to pay the same over to the plaintiff.

3. That the plaintiff's losses and damages by reason of the unlawful acts of the defendant, Ginzberg, be established, and that he be ordered to pay the same.

4. That execution issue against the said Ginzberg individu-
7 ally for such sums as may be found due to the plaintiff from him by reason of his wrongful interference with the plaintiff's property.

5. That if upon hearing by this honorable court it shall appear that the defendant, Ginzberg, acted within his duties as trustee of the bankrupt estate, that the decree run against him as such trustee, but that no execution issue thereon.

6. And for such other and further relief as to this honorable court may seem meet and just.

THOMAS J. BARRY,
H. J. JAQUITH,
Attorneys for Complainant.

Filed April 11, 1904.

EXHIBIT A.

Know all men by these presents that whereas the Board of Police for the City of Boston has granted licenses for the sale of intoxicating liquors of the first and fourth class to be used at # 24 Avery Street and # 2 Haymarket Place, in Boston, in the County of Suffolk, and Commonwealth of Massachusetts, to Herman C. Long, Frank A. Sanderson and Robert J. Tracy, as Herman C. Long and Company, and

Whereas the said licenses have been paid for by the James Everard's Breweries, a corporation having its usual place of business in the City, County and State of New York, and

Whereas the said Robert J. Tracy is the representative of said Breweries upon said licenses,

Now therefore, in consideration of one dollar to the said Long and Sanderson in hand paid by the said Tracy, the said Long and Sanderson do hereby Assign, Transfer and Set Over to said Tracy all their right, title and interest in and to said licenses, and do further Covenant and Agree to and with the said Tracy that they will hereafter make application for licenses to be granted to said premises in their own names and in that of said Tracy and that they will hereafter, upon any licenses being granted to them for said premises, upon demand, Assign, Transfer and Set Over all their interest in said licenses to the said Tracy.

This agreement is to remain in effect so long as the said Long and Sanderson are indebted upon a mortgage to the said James Everard's Breweries.

In Witness Whereof the said Herman C. Long and Frank A. Sanderson hereunto set their hand- and seals this 23rd day of December, 1902.

HERMAN C. LONG. [SEAL.]
FRANK A. SANDERSON. [SEAL.]

8 EXHIBIT B.

Know all men by these presents that whereas the Board of Police for the City of Boston has granted licenses for the sale of intoxicating liquors of the first and fourth class to be used at # 24 Avery Street and # 2 Hayward Place, in Boston, in the County of Suffolk, and Commonwealth of Massachusetts, to Herman C. Long, Frank A. Sanderson and Robert J. Tracy, as Herman C. Long and Campany, and

Whereas the said licenses have been paid for by the James Everard's Breweries, a corporation having its usual place of business in the City, County and State of New York, and

Whereas the said Robert J. Tracy is the representative of said Breweries upon said licenses,

Now Therefore, in consideration of one dollar to the said Long and Sanderson in hand paid by the said Tracy, the said Long and Sanderson do hereby assign, Transfer and Set Over to said Tracy all their right, title and interest in and to said licenses, and do further Covenant and Agree to and with the said Tracy that they will hereafter make application for licenses to be granted to said premises in their own names and in that of said Tracy and that they will hereafter, upon any licenses being granted to them for said premises, upon demand, Assign, Transfer and Set Over all their interest in said licenses to the said Tracy.

This agreement is to remain in effect so long as the said Long and Sanderson are indebted upon a mortgage to the said James Everard's Breweries.

In Witness Whereof the said Herman C. Long and Frank A. Sanderson hereunto set their hands and seals this 24th day of April, 1903.

FRANK A. SANDERSON. [SEAL.]
HERMAN C. LONG. [SEAL.]

9 This Bill was filed and entered in our said Court, on the eleventh day of April A. D. Nineteen hundred and four, and a subpœna was thereupon issued as follows, to wit:

10 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

[L. S.]

To Albert A. Ginzberg, of Boston, in the county of Suffolk, aforesaid, both as individual and as he is trustee in bankruptcy of the joint and separate estates of Herman C. Long and Frank A. Sanderson, Greeting:

We command you that you appear before our Supreme Judicial Court, at the Rules to be holden at Boston within our said County of Suffolk, on the first Monday of May next, then and there to answer to a Bill of Complaint, exhibited against you in our said Court by Robert J. Tracy of New York, in the County and State of New York,

and to do and receive what our said Court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalties in the law in that behalf provided.

Witness, Marcus Perrin Knowlton, Esquire, at Boston, the eleventh day of April in the year of our Lord one thousand nine hundred and four.

WALTER F. FREDERICK,
Ass't Clerk.

[Endorsed:] No. 8750 Eq. Subpœna. Robert J. Tracy *vs.* Albert A. Ginzberg, Jr.

11 On which subpœna is the following Return of the officer serving the same, viz:

SUFFOLK, *ss:*

BOSTON, *April 12th,* 1904.

I this day summoned the within named Albert A. Ginsberg, individually and as Trustee in Bankruptcy as within described to appear and answer at Court as within directed, by delivering to him in hand in each capacity an attested copy of this precept.

JOHN F. KELLY,
Deputy Sheriff.

Fees.

Service	1.00
Copies	2.00
Travel	8
	$3.08

12 The plaintiff appeared by T. J. Barry and H. J. Jaquith, Esquires, his Attorneys; and on the fourteenth day of July in said year, said defendants Ginzberg, Trustee as aforesaid, appearing by Lourie and Ginzberg, Esquires, his attorneys, filed his answer, by consent, to wit:

13 *Answer of Defendant.*

1. The allegations contained in paragraph 1 of the plaintiff's bill of complaint the defendant neither admits nor denies, but leaves the same for the plaintiff to prove, if material, except that he denies that said license was ever issued to Herman C. Long and Frank A. Sanderson and Robert J. Tracy as joint owners, but does admit that it is issued in the names of the said three parties, but that the name of Robert J. Tracy, plaintiff, was on there for the purpose of holding the same as security for a debt due from the bankrupts Herman C. Long and Frank A. Sanderson to the James Everard's Breweries.

2. As to the allegations contained in paragraph 2 of the plaintiff's

bill of complaint, the defendant neither admits nor denies, but leaves the same for the plaintiff to prove, if material.

14 3. As to the allegations contained in paragraph 3 of the plaintiff's bill of complaint, the defendant is informed and believes that for the said advancement of fourteen hundred (1400) dollars recited in paragraph 3 of the plaintiff's bill of complaint, a note payable in instalments was given by the bankrupts Herman C. Long and Frank A. Sanderson to the James Everard's Breweries, and that the name of Robert J. Tracy was put on the license of the bankrupts for the purpose of holding it as security for payment of said debt, and that the plaintiff wrongfully and without right took the said license into his possession and refused to account for the same, although called upon to do so.

4. And the defendant, answering paragraph 4 of the plaintiff's bill of complaint, says he is informed and believes that whatever assignment, if any, was made by the bankrupts Long and Sanderson to the plaintiff, was made for the purpose of giving additional security to the said James Everard's Breweries, and that said assignment was void in law, and that the said Robert J. Tracy never was the owner of said license, and that his name never appeared on said license as owner in fact, but only for the purpose of holding it in security for the debt of the bankrupts.

5. As to the allegations in paragraph 5 of the plaintiff's bill of complaint, the defendant admits the allegation as to the bankruptcy of Long and Sanderson; and as to the allegations of the indebtedness to the James Everard's Breweries, the defendant neither admits nor denies the same, but leaves it for the plaintiff to prove, if material.

6. The allegations contained in paragraph 6 of the plaintiff's bill of complaint the defendant neither admits nor denies, but leaves the same for the plaintiff to prove, if material.

7. As to the allegations in paragraph 7 of the plaintiff's bill of complaint, the defendant denies that he wrongfully procured the board of police of the city of Boston to cancel the plaintiff's license, without notice to him, but says that the plaintiff, by his attorneys, had full notice of the intention of the board to grant a transfer made by the defendant, as trustee in bankruptcy of the estate of Herman C. Long and Frank A. Sanderson, of the interest of the bankrupts to an intended purchaser of said interest; that the plaintiff, by his attorneys, was notified to appear and show cause why said transfer should not be made, but he failed to so appear or assign any reason for his failure to appear.

The defendant further says that he sold the interest of the bankrupts Herman C. Long and Frank A. Sanderson in the license referred to for the sum of three thousand (3000) dollars, after due authority given to him by the court of bankruptcy; that upon the receipt of the said three thousand (3000) dollars, he deposited the same in the Merchants' National Bank, a registry designated by the orders of the court, in the name of Albert A. Ginzberg, trustee in bankruptcy, and that subsequent to said 1st day of April, 1904, after the plaintiff had full notice of the facts, he made certain disbursements,

under order of the referee in bankruptcy, out of the funds
15 realized from the sale of the interest of the bankrupts in said license.

And the defendant further says that the plaintiff was duly notified to appear before the referee in bankruptcy to show cause why said disbursements should not be made out of the said fund, but failed to do so.

The defendant further denies the allegation that he has received two hundred (200) dollars as rebate on the plaintiff's license, but says that his application for rebate was, after due consideration, denied by the police board of the city of Boston.

8. As to the allegations — in paragraph 8 of the plaintiff's bill of complaint, the defendant denies any accounting was demanded from him.

9. As to the allegations contained in paragraph 9 of the plaintiff's bill of complaint, the defendant denies that he acted beyond his powers as trustee of said bankrupt estate, or that the plaintiff was deprived of any valuable privilege which by law he was entitled to, but says, in all matters complained of, he acted within his powers as trustee of said bankrupt estate, and in good faith

Wherefore the defendant respectfully prays that the said bill be dismissed.

A. A. GINZBERG,
By His Attorneys, Lourie & Ginzberg.

Filed, by consent, July 14, 1904.

16 And afterwards, to wit, on the twenty-sixth day of January, 1905, the plaintiff by his attorneys, filed his replication as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

TRACY
vs.
GINZBERG.

Replication.

Now comes the plaintiff in the above entitled action and joins issue with the defendant on his answer.

By His Att'ys, T. J. BARRY,
M.,
H. J. JAQUITH,
M.

17 Thereupon after a hearing, on the eighth day of March, in said year—defendant also appearing by A. W. Putnam, Esquire, his Attorney,—the following Order appointing Commissioner, was issued by our said Court, to wit:

18 *Order Appointing Commissioner.*

In the above-entitled case, at the hearing of the same before Mr. Justice Loring, it is ordered, under the provisions of chancery rules No. XXXV., at the request of the complainant, that said James Lynch be, and he hereby is, appointed commissioner to take the evidence in said case, to be reported to the full court.

By the Court,

WALTER F. FREDERICK,
Assistant Clerk.

March 14, 1905.

19 And on the eighth day of April, A. D. 1905, after a hearing, the following Final Decree was entered by our said Court, to wit:

20 *Final Decree.*

This case came on to be heard upon the merits; and after hearing the parties, and upon consideration thereof, it is ordered, adjudged, and decreed that the plaintiff's bill be, and the same hereby is, dismissed; that the defendant be, and hereby is, awarded his costs, to be taxed by the clerk at $22.49, and that execution therefor issue.

By the Court,

JOHN NOBLE, *Clerk.*

April 8, 1905.

21 From which Final Decree the plaintiff by his Attorneys, appealed to the full Court, as follows, to wit:

Claim of Appeal.

The plaintiff in the above-entitled action claims an appeal to the full bench.

By His Attorney, H. J. JAQUITH.

Filed April 24, 1905.

22 Thereupon the cause was entered in the Supreme Judicial Court for the Commonwealth.

And afterwards, to wit, on the nineteenth day of October in said year, the following Rescript was received from the said Supreme Judicial Court for the Commonwealth, viz:

23 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth,

AT BOSTON, *Oct. 18th,* 1905.

In the case of—

ROBERT J. TRACY
vs.
ALBERT A. GINZBERG

pending in the Supreme Judicial Court for the County of Suffolk:
Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—
Decree affirmed
By the court,

C. H. COOPER, *Clerk.*

October 18, 1905.

24 And on the fifteenth day of November, A. D. Nineteen hundred and five, the following Final Decree, in accordance with said rescript, is entered by our said Court, to wit:

25 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

ROBERT J. TRACEY
vs.
ALBERT A. GINZBERG.

Final Decree.

This case came on to be heard after rescript from the full bench, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the decree heretofore entered dismissing the plaintiff's bill be and hereby is affirmed; and that the defendant be and hereby is awarded his costs, to be taxed by the Clerk in the sum of Twenty-two Dollars and Forty-nine Cents ($22.49); and that execution therefor issue.
By the Court.

JOHN NOBLE, *Clerk.*

November 15, 1905.

26 All and singular which premises we have held good, by the tenor of these presents to be exemplified.
In testimony whereof, we have hereunto caused the seal of our said Court to be hereto affixed.
Witness, Marcus Perrin Knowlton, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston in said County, this thirty-

first day of January in the year of our Lord, Nineteen Hundred and six.

[SEAL.] JOHN NOBLE, *Clerk.*

27 IV.

EVIDENCE BEFORE THE FULL COURT.

Order Appointing Commissioner.

In the above-entitled case, at the hearing of the same before Mr. Justice Loring, it is ordered, under the provisions of chancery rules No. XXXV., at the request of the complainant, that James Lynch be, and he hereby is, appointed commissioner to take the evidence in said case, to be reported to the full court.

By the Court.

WALTER F. FREDERICK,
Assistant Clerk.

March 14, 1905.

Agreement.

It is agreed by counsel for plaintiff and defendant that, subject to the approval of the trial justice, the annexed statement of agreed facts and testimony taken from the evidence as preserved by the commissioner duly appointed, may be printed as the record in this case, together with the bill of complaint, answer, and replication.

H. J. JAQUITH,
Attorney for Plaintiff.
A. W. PUTNAM,
Attorney for Defendant.

Agreed Facts.

December 23, 1902, the Everard Breweries Company, a foreign corporation, was the owner of the stock and fixtures of the Hawthorne Café, situated at 24 Avery Street in the city of Boston. On that day it sold the stock and fixtures to Herman C. Long and Frank A. Sanderson, copartners as Herman C. Long & Company, and purchased an old license to sell liquors for the purpose of surrendering it for cancellation and the issuance of a new license to Long & Company; the sum paid for the old license was $3000. After this, and upon the same day, December 23, 1902, the Everard Breweries Company paid the city of Boston $1400, being the statutory fee, for a first and fourth class license to sell liquors at 24 Avery street; to secure the repayment of the purchase price and these two sums of money the Everard Breweries Company took a chattel mortgage of the stock and fixtures at 24 Avery street which included a covenant that the mortgagees might sell liquors under the license to Long & Company in case of any entry by the mortgagee for breach of condition. (See Exhibits 1 and 2.)

The new licenses were taken out in the names of Herman C. Long, Frank A. Sanderson, and Robert J. Tracy, as H. C. Long & Com-

pany, the latter the secretary and financial manager of the
28 Everard Breweries Company (similar to Exhibits 9 and 10),
and on the day they were issued Long & Sanderson signed the assignment of their rights, title, and interest in said licenses to Robert J. Tracy as set out in Exhibit 3.

The following August, 1903, the United States license to sell liquors at 24 Avery street was taken out in the sole name of Robert J. Tracy. (See Exhibit 11.)

In April, 1903, Long & Company desired to renew the licenses which expired April 30, 1903, and for that purpose Everard Breweries Company paid, by its attorney, Thomas J. Barry, $1400 to the city of Boston for new first and fourth class licenses (see Exhibits 9 and 10), being the statutory fee per current year expiring April 30, 1904. To secure the repayment of this sum of money Long & Company executed an agreement to give a mortgage (see Exhibit 6), and later gave the chattel mortgage set out in Exhibit 5, and also gave the assignment to Robert J. Tracy of their rights, title, and interest in the new license set out in Exhibit 7.

July 20, 1903, both mortgages (Exhibits 1 and 5) were assigned by Everard Breweries Company to Robert J. Tracy (see Exhibits 4 and 8), and some time thereafter Tracy entered to foreclose said mortgages; and thereafter, on July 23, 1903, Long & Company were adjudicated bankrupts by the United States district court for Massachusetts. Tracy or his representatives retained the licenses and continued to do business at 24 Avery street until early in 1904.

July 29, 1903, A. W. Putnam, the trustee's counsel in this case, having been appointed by the United States district court receiver of the estate of Long & Company, bankrupts, sent to Thomas J. Barry, as the representative of Tracy, a letter (Exhibit 12) enclosing a copy of a petition to the board of police of Boston (Exhibit 13), in which Putnam prayed as follows:

"He therefore respectfully prays that the Board will take such steps as lie within its power to enable him to obtain possession of said licenses and will permit him to sell and transfer the same without the concurrence of said Tracy and without his signing a release thereof."

August 21, 1903, the board of police gave a hearing (see Exhibit 14) on said petition (Exhibit 13), at which hearing Barry appeared and claimed for Tracy the ownership of the licenses and of the right to transfer them. No decision was reached by the board of police, and on August 21, 1903, Ginzberg, the present defendant, having, as trustee in bankruptcy, superseded Putnam as receiver, filed a petition with a referee in bankruptcy of the United States district court (Exhibit 18), in which he sought equitable relief in order to perfect in him the title claimed by him to the licenses. Barry accepted service for Tracy, and on February 3, 1904, Tracy filed a special appearance
and denial of jurisdiction (Exhibit 19). The referee took
29 jurisdiction and made an order (Exhibit 20) which was entered February 12, 1904. Tracy filed a petition for review by the district judge (Exihibit 21), insisting upon his denial of jurisdiction in the United States district court. The cause was then heard by the district judge, and on March 28, 1904, the district judge

reversed the referee's order (Exhibit 22) and recommitted the matter to the referee. The trustee, Ginzberg, never amended his pleadings, and no further hearings were had on the matter of Tracy's rights.

On March 5, 1904, Putnam, as counsel for Ginzberg, sent to Barry, as representative of Tracy, a letter (Exhibit 16) enclosing copy of a new petition filed by Ginzberg, as trustee in bankruptcy, with the board of police (Exhibit 15), in which he sought the aid of the board to order Tracy to give up the license.

March 24, 1904, Ginzberg communicated to Barry by mail that he had an offer of $3000 for the license. (Exhibit 17.) Barry had no other information than this except that on March 30, 1904, he was called up on the telephone by one Dolan, a lawyer, who asked him to come at once to the office of the board of police on the matter of Tracy's license; this Barry refused to do, on the ground that he was engaged in court in the afternoon. March 29, 1904, Ginzberg obtained an order from the referee to sell the license as perishable property. (Exhibit 24.)

March 30, 1904, Ginzberg received $3000 from the sale of the license and deposited it in the Merchants' National Bank, the authorized depository for funds in the bankruptcy court. (Exhibit 23.)

Saturday, April 9, 1904, Tracy's counsel heard that the sale had been consummated and a portion of the money paid out. On Monday, April 11, he appeared specially before the United States district court and asked that further proceedings be stayed pending the determination of this action. The petition and order thereon are set out in Exhibit 25.

THOMAS J. BARRY, a witness for the plaintiff, testified that the indebtedness of Long & Sanderson to the Everard Breweries Company had not been discharged, and that only a few small instalments, amounting to several hundred dollars, had been paid on the debt; further, that the value of old licenses was due to the limitation of the number of licenses which could be issued, and that, to the best of his knowledge, the plaintiff, Tracy, was not a partner in the business of Herman C. Long & Company, but that his name was inserted in the license to enable him to do anything he possibly could do as a licensee.

It appeared in the evidence that Barry had had a controversy relating to a license to one Weiner previous to the issuance of the licenses in controversy. Barry testified:

"Q. Do you remember, when you had this hearing on the Weiner license before the police board, that the chairman told you that the board never recognized in any way a lien or a mortgage upon a license?

"A. No.

30 "Q. In substance, that?

"A. No, The Chairman told me that he did not recognize any mortgage upon a license; would not allow it to be mortgaged.

"Q. And they always insisted that where a licensee went into bankruptcy that the proceeds of the license should be divided pro rata, ratably, among the creditors, before they would countenance the transfer?

"A. Is that a question you asked me?
"Q. Yes.
"A. I don't know.
"Q. Didn't they tell you that?
"A. I do not recall that they did.
"Q. Don't you know that that is their rule?
"A. Substantially that, in the last hearing we had on that matter.
"Q. Now I am asking you if you did not know that before Long & Sanderson came on the stage, when you had the Weiner license?
"A. Yes, I should say I did."

None of this evidence was controverted.

ALBERT A. GINZBERG, the defendant, testified in his own behalf that at a hearing before the board of police the following conversation took place: The commissioners asked Mr. Barry what interest or what right he claimed in that license. The specific question was asked him, I think, by Judge Emmons: "Do you claim that Mr. Tracy is a partner?" He said "No." He said, "Well, what right or interest do you claim?" He said, "We claim a third interest in this license, to the extent of about $1000," and Commissioner Curtis, I believe, asked him, "How do you base your claim?" "Well," he said, "we paid for this license and there is about that much due on it."

On cross-examination by the defendant on this point Mr. BARRY testified,—

"Q. My question is, Mr. Barry, you stated, in reply to one of the commissioners, that your client claimed an interest of $1000?

"A. Only in this way, that after an argument as to my client's position, and the discussion as to whether or not licenses could be mortgaged, as to whether or not I had any right there before the commissioners, or before the bankruptcy court, that I thought I could at least collect $1000, being the amount my client had paid for the license."

GINZBERG testified further that Charles F. Dolan came to his office and said, "I understand that you have a license for sale." I said, "I don't know whether I have; the matter is now before the police commissioners. You had better find out from them as to what they want before I can tell you whether I can sell it." He said, "I have been to see them, and they say that they require your signature. I said, "You had better go and find out exactly what papers or instruments they want and arrange a date and let me know." He came back and said, "They want a statement from you in writing that you
31 are trustee of this estate and that you will distribute this money in accordance with the bankruptcy rules." I said, "All right, get the paper." That paper was drawn and we met at the police commissioners' some time about the latter part of March or the first of April.

"Q. What happened there?

"A. We went before the commissioners, as I told them that I had authority from the bankruptcy court to sell that license, and that paper which I understood they required was there ready to be filed

and I handed over to them a short note, signed by myself as trustee, that I would deposit this money in the bankruptcy registry and distribute it according to the instructions of the judge.

"Q. Where did you deposit it?

"A. I deposited it in the Merchants National Bank as trustee. It is admitted that said bank is an authorized bank of deposit for bankruptcy funds."

On cross-examination he testified that at the time the plaintiff filed his bill of complaint he had paid out $500 of the funds: $200 to Mr. Gray for services as attorney in bankruptcy, also for bonds of the trustee and receiver; that he also paid the appraisers for their services and paid his counsel in this case, Mr. Putnam, $300; and in response to question by counsel for plaintiff as to the day of the month in which these payments were made he answered, "I remember on a Friday I met you in the court and I said, 'There is a certain petition pending for certain allowances that are going to be taken up.' The next day I received a letter from you stating your objection to making any payment. The allowance and the payments were made on Friday." And further, in response to question, "Q. The payments which you made were made while our rights in the license were before the district court without adjudication, that report having been reversed by Judge Lowell?" he testified, "I don't know as it would be proper to say while the matter is still undecided. I met you that morning in the bankruptcy court. I said, 'I have sold the licenses.' You asked me the question, 'Then you abandon the proceedings here?' I said, 'I do not know whether I do or not. The license has already been sold. I may go before the referee on some allowance.'"

It was agreed that the bankrupt Sanderson, if present, would testify that Mr. Tracy, the plaintiff, was not a partner in the firm of H. C. Long & Company, composed of H. C. Long and Sanderson, and Tracy's name on the license was merely for security for the money which he or the brewery advanced.

All the other material evidence related to the custom of the police board, and appeared in the evidence of Charles P. Curtis, a police commissioner, Thomas Ryan, clerk of the police board, and Charles Dolan, the attorney for the purchaser of the license, whose evidence follows, verbatim, as taken by the commissioner.

32 THOMAS RYAN sworn.

(By Mr. JAQUITH:)

"Q. What is your full name?

"A. Thomas Ryan.

"Q. What is your occupation?

"A. I am clerk of the board of police of Boston.

"Q. Will you state the amount which the city of Boston derives annually from the issuance of licenses?

"[Question objected to and excluded.]

"Q. How many licenses are issued in the city of Boston?

"A. Licenses are issued to places—that is, not over a thousand.
"Q. Not over a thousand?
"A. Not over a thousand places.
"Q. And what would the fees amount to in—one place?
"A. They might vary from $2300 to $500, which is the cheapest.
"Q. How long have you been clerk of the police board?
"A. Sixteen years, and near seventeen.
"Q. And now will you state what the custom of the board is in the issuance of licenses and the cancellation of old licenses, or surrender of old licenses?
"A. When a man in the liquor business, wants to retire from it, the custom has been for him to find somebody who will pay him and make it an object for him to retire from the business, and buy the stock and the privilege, the stock without the privilege, or the privilege without the stock.
"Q. The privilege of applying for a new license?
"A. Yes, and if the person who applies for the license is satisfactory to the board they allow the old licensee to sell his license and retire from business, so that there may be room made for the new one to come in.
"Q. That has been the custom for how long?
"A. Anyway, since the enactment of the bankruptcy law by the United States. I do not remember the time.
"Q. I am going back of that. You have been clerk, you say, for sixteen or seventeen years, and whether or not that has been the custom of the board during all your term of service, or ever since the number of licenses has been limited?
"A. Practically all; not until the number of licensed places was limited by the commonwealth.
"Q. Up to that time there was no value, but since that time this custom has been followed?
"A. Yes, sir.
"Q. Have you any knowledge of the bonuses?
"The COURT: How were the number of licenses limited formerly?
"Q. Have you any recollection when these licenses were——
"A. I anticipated the rest of the question. In 1888 the legislature passed a law limiting the number of licenses in the city of
33 Boston.
"Q. One of every five hundred inhabitants, but not to exceed one thousand licensed places in the city. Acts of 1888, c. 340.
"A. That clause regarding the limitation to a thousand was a subsequent law. It was regulated according to the number of people known to be inhabitants of the city, one of each five hundred, and then, in six or seven years later, the places were increasing more rapidly than some people thought they ought to, so they put a limit, no matter what the population might be.
"Q. There is another question I would like to ask you: what the custom was on the matter of a rebate on a license? That rebate is only allowed when a license is cancelled before the expiration of the term for which the fee was paid?

"[Question objected to and admitted.]

"Q. What is the custom of the board relating to rebates on licenses?

"A. Rebates are allowed to licensees going out of business, according to the term that you have had the use of the license. If he stays in business a month, then he gets eleven twelfths of the license fee.

"Q. So that, upon that rule, what length of time would a rebate of $200 on this license of $1400 indicate was the unexpired term of the Tracy license?

"A. That $200 of course would be a matter of arithmetic. If this was a $1400 license it would be——

"Q. One seventh of it.

"A. That is $116—about $120 a month.

"Q. So that a rebate of $200 would indicate the termination of the license somewhere between one and two months of its expiration?

"A. We figure it down to the day the transaction was made.

Cross-examination.

(By Mr. PUTNAM:)

"Q. Mr. Ryan, isn't it true that this rule of the commissioners sometimes amounts to this: that when a man who holds the license——

"The COURT: Is this rule in writing?

"Mr. PUTNAM: I understand not.

"The COURT: Will you ask Mr. Ryan?

"Q. Have the police commissioners ever passed any vote establishing the rule under which licenses are issued?

"A. I do not understand they did. There is not anything on my records, but they keep memorandum records for their own use that I am not familiar with.

"Q. There is no vote on the official records?

"A. No, sir.

"Q. And you have never heard of any rule in regard to it?

"A. I have seen a rule in typewriting that was made by the commissioners for their own guidance.

34 "Q. You have often heard it stated by the commissioners?

"A. Yes.

"Q. Doesn't it amount to simply this: that when a man wants to go out of business he can suggest to the commissioners the name of some party who shall be granted the vacant license, the new license which will be issued in his place; and if he is a good man, the commissioners will give him the preference?

"A. Yes, sir, that is true.

"Q. And after the passage of the bankruptcy act they recognized that same privilege, allowed that same courtesy to the trustee in bankruptcy?

"A. Yes, sir.

"Q. In place of the retiring saloon keeper?

"A. Yes, sir.

"Q. And isn't it true that at all times the commissioners have

insisted that they would not appoint any nominee unless they were sure that the money would be divided equally among the creditors?

"A. That is an understanding with the person that receives the money, that it must be.

"Q. The understanding is that if the person who receives the money does not promise to do that, they will hold the thing up or they will appoint somebody else of their own selection?

"A. They do that, of course.

"Q. They do do that sometimes?

"The COURT: The question is the rule of the commissioners. Is there a rule out on that point?

"The WITNESS: On the holding up of the licenses?

"The COURT: Of not accepting the nomination of anybody in case of bankruptcy unless there is assurance given that the proceeds will be divided pro rata among the creditors?

"A. I do not know that there is any written rule, but it is the custom established and required in every case.

"Q. For a good many years have not the police board required a trustee in bankruptcy to file a written statement that he will divide this money equally among the creditors?

"[Question objected to and admitted.]

"Q. Is it not true that for a good many years they have required every trustee in bankruptcy who wishes to select some new licensee to file a paper stating that the money they should receive would be divided equally among the creditors?

"A. I don't know that they exact a paper, but they assure themselves that such will be done. I don't know that they require a written guarantee at all.

"Q. Don't you know that they have received such a promise in a great many cases?

"A. Yes.

"Q. Didn't they in this case?

"A. I did not look for that. I should have to look it up to see.

35 "Q. Do you think you have got it there? I will just ask you one more question. In the matter of refunding, that is covered by a statute which was passed in 1903?

"A. 1902, I think.

"Q. 1902?

"A. Yes.

"Q. It is left to the discretion of the board as to whether a rebate shall be given or not?

"A. The board has taken the ground that they are entitled only to make a levy on the state treasurer in favor of the licensee; that is, the person going out of the business.

"Q. It only applies where the new license is given for the same premises?

"A. The same class; yes, sir.

"Q. And the same class?

"A. Yes.

CHARLES F. DOLAN sworn.

(By Mr. JAQUITH:)

"Q. What is your full name?
"A. Charles F. Dolan.
"Q. And your occupation?
"A. Attorney at law.
"Q. Will you state whether during the year 1904 you had any dealings with Mr. Ginzberg about a saloon license?
"A. I had.
"Q. Will you please state when these dealings began and what they were?
"A. I represented William F. O'Hearn, who was in the market to purchase a right to succeed some licensee. In consequence of that I talked with Mr. Ginzberg at his office at various times.
"Q. When was that?
"A. That was in February, I think, some time, of 1904.
"Q. And when did you reach the point of an offer to purchase?
"A. Well, I don't remember the exact date.
"Q. About when?
"A. Well, it was some time during March, I think, during the month of March.
"Q. Whether, at the time that you made the offer, you had received assurance that the police commission would consent to the issuance of a new license to your client?
"A. I had; yes, sir.
"Q. Whether or not you would have paid anything to Mr. Ginzberg had it not been for the fact that you had knowledge that the police commission would accept the nomination?
"A. I certainly would not have advised my client to pay any money unless he had that assurance.
"Q. Your best recollection is that you had that assurance in March, 1904?
"A. I won't say the exact time, but some time after February.

36 Cross-examination.

(By Mr. PUTNAM:)

"Q. This assurance that your man would be granted a license was from the commissioners themselves?
"A. Yes, sir.
"Q. And you put in a written application?
"A. Yes, sir.
"Q. Filling out one of the blanks supplied by Mr. Ryan?
"A. Yes, sir.
"Q. And the application had no reference in any way to a license held by Long & Sanderson?
"A. It had not.
"Q. Did you go before the commissioners with Mr. Ginzberg?
"A. I did.
"Q. And Mr. Ginzberg recommended your man as the proper person?

"A. Yes, sir.
"Q. And after they took final action in granting a license you paid $3000 to Mr. Ginzberg?
"A. Yes.
"Q. That is all there was to it?
"A. That is all.
"Q. Mr. Ginzberg did not give you any bill of sale, selling any interest of Mr. Tracy?
"A. Nothing in that line. All the board required me to do was to present a certificate from the trustee that he had authority to sell, which I did.
"Q. He recommended your man?
"A. He did.
"Q. That is all he did?
"A. That is all.
"Q. Did you have a conversation with Mr. Barry over the telephone?
"A. Mr. Barry called me up, I think.
"Q. And you had a talk with him?
"A. I did.
"Q. That was before the commissioners took any action?
"A. That was before the license was cancelled and issued to Mr. O'Hearn.
"Q. Do you remember that conversation, or the substance of it?
"A. No, I could not. It has passed from my mind entirely.
"Q. Do you remember whether or not you asked him to go up to the police board?
"A. Yes, I remember that part of it. I telephoned Mr. Barry that the board of police were going to consider, at a certain time, the cancellation of the Long license, and asked him to be present.
"Q. And he refused to come up?
"A. He said he was busy and could not come up, as I remember it now.
"Q. Did you have more than one conversation with him—with Mr. Barry?
"A. No.
"Q. Did you ever meet him up in the commissioners' room?
"A. No, no.

"Mr. PUTNAM: I think that is all.
"Mr. JAQUITH: There is one question, your honor, I would like to ask of Mr. Ryan, if he has not gone, if the court will permit it.

37 THOMAS RYAN recalled.

(By Mr. JAQUITH:)

"Q. Whether or not it is customary for the board, when an old license is cancelled and a new license is issued on nomination, to require the surrender of these papers to the board for cancellation?
"A. They do so request.
"Q. In this case was it done?
"A. The request was made, but it was not complied with.

Cross-examination.

(By Mr. PUTNAM:)

"Q. I will ask you, Mr. Ryan, if the commissioners—Suppose there are three names on the license, and two men surrender the license and sign the cancellation of it on the back, would the commissioners consider that a cancellation and issue a new license without notice to the other man whose name was on the license?

"A. They would act on the recommendation of the trustee, if it was a man in bankruptcy.

"Q. Supposing, now, that there is no bankruptcy about it; suppose three men hold a license and two of them want to retire and they bring in their old certificate to the board, and they ask the board to issue a new license to a friend of theirs?

"[Question objected to.]

"Q. I will ask it again. Suppose there are three men whose names are on the license, and two of them should bring in the license to your office and ask to have it cancelled, and ask the board to issue a new license to some friend of theirs: is it not true that before the board took any action on it they would send notice to the other man whose name was on the license so that he could have a chance to come in and be heard?

"A. They could certainly require the two men to show cause why the other was not joined with them in the request.

"Q. So that it would be difficult for two of the men who were on the license to sell out without the knowledge of the other man?

"A. Yes, sir, it would be.

"Q. And the fact that another man's name was on the license would give him a certain hold upon the transfer of that license?

"A. He would be considered when the question of transferring came.

CHARLES P. CURTIS sworn.

(By Mr. PUTNAM:)

"Q. Your name is Charles P. Curtis?

"A. Yes.

"Q. You are a member of the police commission?

"A. Yes, sir.

"Q. For how long?

"A. Nine years and some months.

38 "Q. Now has the board any established custom in regard to the cancellation of an old license when a man wished to retire from business, and the granting of a new license to fill that vacancy?

"A. Yes, sir.

"Q. Will you state what that custom is?

"A. When a man in the liquor business wants to go out of business, the board of police will take first into consideration, in action upon application, the name of a man who is endorsed by the former liquor dealer, the former licensee.

"Q. Now how long has that been the established rule of your board?

"A. I should say at least five or six years, if not more.

"Q. Have you any established custom——

"A. The custom has become more and more systematized within the last few years.

"Q. Have you any established custom in the case of bankrupts where a licensee goes into bankruptcy?

"A. Yes.

"Q. What is that?

"A. We take first into consideration the applicant for a license who is endorsed by the trustee in bankruptcy of the bankrupt liquor dealer.

"Q. Have you any other established custom in the bankruptcy court, especially in reference to any money which the trustee in bankruptcy may derive from the person whom he nominates?

"A. Yes, we have always insisted that all the proceeds from the sale of a license or a position in the ranks among the liquor dealers which the trustee receives for endorsing be distributed ratably among the creditors.

"Q. 'Divided ratably among the creditors:' what do you mean by that?

"A. I mean that we have never recognized a mortgage on the license, a lien of any sort.

"Q. How long has that been your custom?

"A. I think since 1900 or 1899.

"Q. Whether or not the board has ever stated that custom publicly?

"A. Oh, yes, that is generally and thoroughly understood among the liquor dealers.

"Q. In the executive session of the board, have you ever had occasion—or have you had occasion frequently—to state that position?

"A. You mean the executive session?

"Q. I mean where the board gets together.

"A. Among ourselves?

"Q. No, I mean when there are others present.

"A. Yes, many times.

"Q. Do you remember the license that was granted to a man named Weiner up on Avery street?

"A. I think I do. Not very distinctly. He was among some hundreds of others.

"Q. We will refresh your recollection by telling you that he went into bankruptcy, and that a lawyer named Mr. Jeremiah Smith was the trustee: does that refresh your recollection in any way as to whether there was any discussion or dispute before your board in regard to the cancellation of Weiner's license?

39 "A. I know we have had many, but I do not remember the circumstances in this particular case.

"Q. Now, Mr. Commissioner——

"A. I will say definitely enough to testify about it at that time.

"Q. Can you state why the police board have established that cus-

tom in regard to the distribution ratably among the creditors by the trustee in bankruptcy?

"[Question objected to, excluded, and exception noted.]

"Q. Now in regard to this particular case, the Long & Sanderson license: have you any recollection in regard to that?

"A. Yes. I have not examined the papers; I *I* have not examined all of the papers, and it has been called to my attention within an hour, but I have some memory of it.

"Q. The new license was issued to a man named O'Hare?

"A. O'Hearn.

"Q. Will you tell us what you required, before the issuance of the license to O'Hearn, for Mr. O'Hearn to do or for Mr. Ginzberg to do?

"A. I have not seen the papers, and I cannot answer that question. This was among other cases at the same time.

"Q. When a license certificate is made out like that, with three names on it, and the licensees desire to surrender up that license, to go out of business, have the police commission any practice in regard to the disposition of the license certificate?

"A. We require that that license—as a general rule we require that that license certificate shall be given to us and endorsed.

"Q. And filed away?

"A. Yes.

"Q. By whom do you ask it to be endorsed?

"A. By the licensees.

"Q. All of them?

"A. All of them.

"Mr. PUTNAM: That is all

"Mr. JAQUITH: I have no questions to ask.

"The WITNESS: I have testified to our general rule, our custom.

"(By Mr. PUTNAM:)

"Q. Do you remember in this Long & Sanderson license, you required the license certificate to be deposited in your office?

"A. I do not think we did.

"Q. Can you state why you made an exception in this case?

"A. Because when Tracy refused to endorse the certificate, the license paper——

"Q. So you granted a license to Mr. O'Hearn without that old one being deposited?

"A. Yes.

"Q. How did the board regard Mr. Tracy, as far as this license was concerned?

"[Question objected to.]

40 "Q. Whether or not the board regarded Mr. Tracy as a licensee?

"[Question objected to.]

"Q. Did Mr. Tracy object to a new license being issued to any person?

"A. I do not remember that he did. I do not think that he did.
"Q. Did any lawyer on his behalf; Mr. Barry, or Mr. Jaquith?
"A. I do not think he did.
"Q. Is there any memorandum in your office from which you can refresh your recollection before two o'clock?
"A. I have no doubt of it, that I can refresh my recollection and see whether he did, at two o'clock.
"Q. Will you be kind enough to do it.

"[Objected to by Mr. Jaquith.]

"(By Mr. JAQUITH:)

"Q. In order to save Mr. Curtis the trouble of coming back, I would like to ask Mr. Curtis whether I ever appeared before him in any way in connection with the Tracy matter?
"A. I do not remember."

The plaintiff requested the following rulings:—
1. That the plaintiff's right in the license issued jointly to him and to Long & Sanderson, who subsequently assigned their interest to him, was a vested property right within the meaning of article 14 of the Constitution of the United States.
2. That the police commission of the city of Boston is not a judicial body, and its acts in dealing with the plaintiff's rights do not constitute due process of law within the meaning of article 14 of the Constitution of the United States.
3. That the plaintiff's contract with Long & Sanderson for assignment of licenses and that they should make no application for a renewal of the licenses except to themselves and Tracy, was a vested, a property, right and is protected by the Constitution of the United States, article 14.
4. That the defendant, Ginzberg, as trustee in bankruptcy is bound by the assignments and covenants of Long & Sanderson with relation to this license as fully as the bankrupts were.

"The COURT: The first prayer the plaintiff asks—I shall not give that.
"Second: * * * I do not see that that is material.
"Third: * * * Well, if it is, it does not affect the question.
"Fourth: * * * I do not think that is so.
"Now I have written out a finding with some care. This is my finding in this case:

41 "I find it has been for several years the custom of the board of police commissioners of the city of Boston to give preference to a person nominated by a licensee who is retiring from business, in issuing a license to fill that vacancy. This custom is founded on the fact that the number of licenses which can be granted in the city of Boston is limited to one thousand. Where a licensee is adjudicated a bankrupt, it is the custom of the police commissioners to give some preference to the trustee of the bankrupt estate, and they require the trustee to stipulate, so far as he can, that the proceeds received for the nomination are to be distributed pro rata among the

creditors of the bankrupt liquor dealer. By the custom of the police commissioners no preference is given to a person to whom the license or the right to nominate a person to fill the vacancy caused by the holder of a former license retiring from the liquor business has been issued to secure a debt, even if the debt was incurred by him to pay the licensee for the license in question. In the case at bar, the police commissioners were satisfied that the name of Tracy was inserted in the two licenses to secure to his principal the debt, or part of the debt, due from the defendant Long & Sanderson; that he was not a partner in the liquor business, and for that reason the police commissioners gave a preference to O'Hearn, who was nominated by the trustee in bankruptcy, with the consent, or against the objections, of Tracy, in deciding to whom a license should be issued on the vacancy caused by Long & Sanderson going out of business.

"The trustee received three thousand dollars for the nomination by him, and I find that it is, in fact, the value of such a nomination. It follows that the three thousand dollars received by the defendant was received for something which he had, and not for anything which the plaintiff had, and the defendant is entitled to have the bill dismissed with costs."

Final Decree.

This case came on to be heard upon the merits; and after hearing the parties and upon consideration thereof, it is ordered, adjudged, and decreed that the plaintiff's bill be, and the same is, hereby dismissed; that the defendant be, and hereby is, awarded his costs to be taxed by the clerk, and that execution therefor issue.

EXHIBIT 1.

Chattel mortgage given by Herman C. Long and Frank A. Sanderson, copartners as Herman C. Long & Company to James Everard Breweries; consideration $7500, secured by stock and fixtures at 24 Avery street, Boston. The last clause is as follows, "And 42 the mortgagors further specially covenant and agree that in case the mortgagee takes possession of the property hereinbefore described and exercises the powers of conducting the business as aforesaid, they shall and will upon request, do and perform all acts, matters and things essential to enable the mortgagee to exercise the authority and enjoy the privileges and securities given the mortgagors by reason of certain licenses for the sale of intoxicating liquors which have or may be granted to them by the Board of Police of the said City of Boston."

Dated December 23, 1902, Recorded with records of mortgage. City of Boston December 29, 1902.

Exhibit 2.

Note secured by above mortgage (Exhibit 1) for $7500, dated December 23, 1902, signed by Herman C. Long and Frank A. Sanderson, payable in instalments to James Everards Breweries at their office in New York city, with interest at six per cent. per annum.

Exhibit 3.

Know all men by these presents that whereas the Board of Police of the City of Boston has granted licenses for the sale of intoxicating liquors of the first and fourth class- to be used at #24 Avery Street and #2 Haymarket Place in Boston, in the County of Suffolk and Commonwealth of Massachusetts, to Herman C. Long, Frank A. Sanderson and Robert J. Tracy, as Herman C. Long and Company, and

Whereas the said licenses have been paid for by the James Everard's Breweries, a corporation having its usual place of business in the City, County and State of New York, and

Whereas the said Robert J. Tracy is the representative of said Breweries upon said licenses,

Now Therefore, in consideration of one dollar to the said Long and Sanderson in hand paid by the said Tracy, the said Long and Sanderson do hereby Assign, Transfer and Set Over to said Tracy all their right, title and interest in and to said licenses, and do further Covenant and Agree to and with the said Tracy that they will hereafter make application for licenses to be granted to said premises in their own names and in that of said Tracy and that they will hereafter, upon any licenses being granted to them for said premises, upon demand, Assign, Transfer and Set Over all their interest in said licenses to the said Tracy.

43 This agreement is to remain in effect so long as the said Long and Sanderson are indebted upon a mortgage to the said James Everards Breweries

In Witness Whereof the said Herman C. Long and Frank A. Sanderson hereunto set their hands and seal this 23rd day of December, 1902.

HERMAN C. LONG. [SEAL.]
FRANK A. SANDERSON. [SEAL.]

Witness:
T. J. BARRY.

Exhibit 4.

Assignment of mortgages and note (Exhibits 1 and 2) by James Everard's Breweries to Robert J. Tracy of New York.
Dated July 20, 1903.

Exhibit 5.

Chatel mortgage given by Herman C. Long and Frank A. Sanderson, copartners as Herman C. Long & Company to James Everard's Breweries; consideration $1400, secured by stock and fixtures at No. 24 Avery street, Boston. Dated June 24, 1903.

Recorded June 27, 1903, with records of city clerk of Boston.

Exhibit 6.

In consideration of James Everard's Breweries advancing to Herman C. Long & Company fourteen hundred ($1400) dollars for the purpose of paying for liquor licenses of said Long & Company on the first of May 1903, the said Long & Company agree to re-pay said fourteen hundred ($1400) dollars in the following manner:

$150. on May 2nd 1903 and the further sum of $150. on the second day of each month thereafter for eight months, and upon the second day of the ninth month, the further sum of $50. and to give to said Breweries a second mortgage of personal property of the stock, fixtures and stock in trade in the premises #24 Avery Street, in said Boston, which mortgage shall contain a covenant that upon the failure of said Long & Company to pay any of said instalments, that the entire sum shall become due and payable, and to deliver said mortgage up on demand.

As also they will execute to said Breweries an assignment of the lease of said premises as additional security for the payment of said $1400. as aforesaid.

44 In Witness Whereof the said Long & Company have hereto set their hands this 25th day of April, 1903.

FRANK A. SANDERSON.
HERMAN C. LONG.

Exhibit 7.

Know all men by these presents that whereas the Board of Police for the City of Boston has granted licenses for the sale of intoxicating liquors of the first and fourth class- to be used at #24 Avery Street and # 2 Haymarket Place, in Boston in the County of Suffolk and Commonwealth of Massachusetts, to Herman C. Long, Frank A. Sanderson and Robert J. Tracy, as Herman C. Long and Company, and

Whereas the said licenses have been paid for by the James Everard's Breweries, a corporation having its usual place of business in the City, County and State of New York, and

Whereas the said Robert J. Tracy is the representative of said Breweries upon the said licenses,

Now Therefore, in consideration of one dollar to the said Long and Sanderson in hand paid by the said Tracy, the said Long and Sanderson do hereby Assign, Transfer, and Set Over to said Tracy all their right, title and interest in and to said licenses, and do further Covenant and Agree to and with the said Tracy that they will here-

after make application for licenses to be granted to said premises in their own names and in that of said Tracy and that they will hereafter, upon any licenses being granted to them for said premises, upon demand, Assign, Transfer and Set Over all their interest in said licenses to the said Tracy.

This agreement is to remain in effect so long as the said Long and Sanderson are indebted upon a mortgage to the said James Everard's Breweries.

In Witness Whereof the said Herman C. Long and Frank A. Sanderson hereunto set their hands and seals this 24th day of April, 1903.

FRANK A. SANDERSON [SEAL.]
HERMAN C. LONG. [SEAL.]

EXHIBIT 8.

Assignment of mortgages (Exhibit 5) by James Everard's Breweries to Robert J. Tracy of New York. Dated July 20, 1903.

45 EXHIBIT 9.

A fourth class license in ordinary form, No 481, issued *for* the board of police of the city of Boston for the years 1903-1904 to Herman C. Long, Frank A. Sanderson, and Robert J. Tracy, as Herman C. Long & Company at No 24 Avery street, 2 Haymarket place, and bulkhead entrance on Haymarket place; in one room first, three rooms second, twelve rooms third, twelve rooms fourth floors; cellar for kitchen and stock only, of said building, until May 1, 1904, to expose, keep for sale, and to sell spirituous and intoxicating liquors of any kind, not to be drunk on the premises:

"This license is granted and accepted upon the express condition that the person or persons above licensed shall in all respects fulfill and conform to all the conditions and requirements of chapter 100 of the Revised Laws of Massachusetts, and of all acts supplementary thereto, or in amendment thereof, and that for breach of any of its conditions or requirements this license shall become forfeited, null and void."

R. F. CLARK,
C. P. CURTIS,
H. F. ADAMS,
Board of Police.

Dated May 1, 1903.

EXHIBIT 10.

First class license, No. 481, same as Exhibit 9 except that it permitted the licensee to sell spirituous and intoxicating liquors of any kind to be drunk on the premises.

R. F. CLARK,
C. P. CURTIS,
H. F. ADAMS,
Board of Police.

May 1, 1903.

[Exhibits 9 and 10 were exhibits put in evidence by the plaintiff, they having been in his possession ever since the plaintiff took possession of the place of business of Long & Sanderson.]

46 EXHIBIT 11.

United States Internal Revenue Special Taxes, No. 117,641, series of 1903, as follows:

"Received from Robert J. Tracy the sum of $25. for special taxes on the business of retail liquor dealer at # 24 Avery Street, Boston in the State of Massachusetts for the period represented by coupon or coupons hereto attached, dated at Boston August 12, 1903.

JAMES D. GILL,
Collector for Third District, State of Massachusetts."

Coupons attached are for the months July, 1903, to June, 1904, inclusive.

EXHIBIT 12.

BOSTON, *July* 29, 1903.

Thomas J. Barry, Esq., 4 Post Office Sq., Boston, Mass.

DEAR SIR: I have prepared a petition, a copy of which I enclose, addressed to the Police Board, for the purpose of ascertaining whether I can effect a sale of the Long licenses without Mr. Tracy's release. I have asked the Board to give me a hearing on that and as soon as any date is appointed I will let you know.

Yours very truly, A. W. PUTNAM.

Enc.

EXHIBIT 13.

To the Honorable Board of Police City of Boston:

Respectfully represents Alfred W. Putnam that upon the 23rd day of July, 1903, Herman C. Long and Frank A. Sanderson, copartners trading as H. C. Long and Company, were adjudicated bankrupts by the United States District Court; upon the same day your petitioner was appointed receiver of their estate and duly qualified by giving bond.

That the bankrupts were in the retail liquor business at 24 Avery Street, Boston, and were the licensees named in a certain first and fourth class license issued by your Board to them. That the name of Robert J. Tracy also appears as licensee in said licenses.

Your petitioner is informed and believes that said bankrupts prior to their adjudication assigned said licenses to said Tracy and that the purpose of said Tracy's name being upon said license was merely to secure an indebtedness owed to the James Everard Brewer-
47 ies and that said Tracy is an officer of said Breweries; that said Tracy was not a partner in the business carried on by the

Bankrupts and had no interest therein except as a creditor or as an agent for said Breweries. Your Petitioner further represents that he is informed and believes that said Tracy is a citizen and resident of the State of New York.

Your Petitioner is further informed and believes that said Tracy is now in the possession of the premises recently occupied by said Bankrupts, having entered thereon under a mortgage held by him and that he, the said Tracy, acting through certain servants and agents (Whose names are unknown to your Petitioner) is now carrying on and conducting said business under said licenses and refuses to deliver the same to your Petitioner but claims that the same belong to him by virtue of said assignment thereof.

Your Petitioner respectfully represents that said assignment of said licenses is in violation of a long established policy of your Board.

Your Petitioner further says that he believes that the only valuable asset of said Bankrupts' estate is said licenses; that if the same can be obtained by your petitioner a large amount of money can be realized from the sale thereof for the benefit of all of the creditors of said estate, but in view of said Tracy's refusal to surrender up the license certificates or release his interest therein your Petitioner is unable to effect a sale or to offer the same for sale.

He therefore respectfully prays that the Board will take such steps as lie within its power to enable him to obtain possession of said license and will permit him to sell and transfer the same without the concurrence of said Tracy and without his signing a release thereof.

ALFRED W. PUTNAM.

EXHIBIT 14.

POLICE DEPARTMENT,
CHIEF CLERK'S OFFICE, *Aug.* 21, 1903.

Thomas J. Barry, # 4 Post Office Sq.:

The Board of Police directs me to request you to call at its office, 29 Pemberton Square, at 12 o'clock m. Monday 24th inst. regarding Herman C. Long & Co. License.

For the Board.

THOMAS RYAN, *Clerk.*

48 EXHIBIT 15.

To the Honorable Police Commissioners of the City of Boston:

Respectfully represents Albert A. Ginzberg that he is trustee in bankruptcy of the estate of Herman C. Long and Frank A Sanderson, copartners trading as H. C. Long and Company; that said bankrupts were the owners at the time they went into bankruptcy of a first and fourth class license granted to them at the location # 24 Avery Street, Boston and that the name of Robert J. Tracy was placed upon said license as security for certain money loaned by said Tracy to the bankrupts, and that the bankrupts attempted to pledge

their said licenses contrary to the rules and practice of the Commissioners.

Your petitioner has often demanded that said Tracy surrender up said licenses to him in order that he might dispose of the same, for the benefit of the creditors of the estate, but said Tracy refused so to do and took possession of said licenses and carried on said business on said premises # 24 Avery Street under and by virtue of said licenses.

Thereupon your petitioner as trustee brought proceedings in the United States District Court for the purpose of obtaining possession of said licenses, and after a hearing upon said petition the Court entered a decree, a copy of which is hereto annexed marked "A," wherein the Court declared said pledge of said licenses to be null and void and ordered the said Tracy forthwith to deliver the same up to your petitioner.

Your petitioner says that said Tracy has failed and refused to comply with the orders of said Court, but has taken an appeal thereon and your petitioner believes that the said appeal is merely for the purpose of delay and with intent of depriving said estate from the benefit to be derived from the sale of said licenses.

Your petitioner believes that the only practical method of obtaining possession of said licenses is through this honorable Board.

Wherefore your Petitioner prays this Honorable Board will cause the person in occupation of said premises to deliver to this Board said licenses for the benefit of the estate in bankruptcy of said bankrupts.

ALBERT A. GINZBERG.

49 A.

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of Massachusetts.

HERMAN C. LONG ET AL., Bankrupts.

ALBERT A. GINZBERG, Trustee,
vs.
ROBERT J. TRACY.

Decree.

FEB. 12, 1904—11.10 a. m.

The petition of the trustee against Robert J. Tracy having come on to be heard and after hearing counsel for the trustee and for the respondent on the question of jurisdiction, it is ordered;

First: That any and all assignments executed by the bankrupts to the respondent purporting to convey or pledge their liquor license be and hereby are declared null and void.

Second: Said Robert J. Tracy, the respondent, be and hereby is ordered to forthwith assign, transfer and deliver to the trustee any

and all licenses formerly owned by the bankrupts and to execute such other papers or instruments as may be necessary to perfect said trustee's title to said licenses or to enable him to sell or convey the same.

JAMES M. OLMSTEAD, *Referee.*

EXHIBIT 16.

BOSTON, *Mar.* 5, 1904.

Thomas J. Barry, Esq., # 4 Post Office Sq., Boston, Mass.

DEAR SIR: I enclose the only copy I have of my petition in the Long matter and will ask you to make a copy and return this to me. I wish you would ask Mr. Jaquith to send me a copy of his petition for review in the same case.

Very truly yours, A. W. PUTNAM.

50 EXHIBIT 17.

MARCH 24, 1904.

T. J. Barry, Esq., # 4 P. O. Sq., Boston, Mass.

DEAR SIR: I have an offer of $3000. and the probabilities are that the party will go up to $3200. or $3300. I shall know definitely on Saturday, at which time I shall notify you.

Very truly yours, ALBERT A. GINZBERG.

EXHIBIT 18.

In the District Court of the United States for the District of Massachusetts.

In the Matter of H. C. LONG ET AL., Bankrupts.

ALBERT A. GINZBERG, Trustee,
vs.
ROBERT J. TRACY.

Respectfully represents Albert A. Ginzberg that the bankrupts and one Robert J. Tracy were the purported owners of a liquor license of the first and fourth class, issued by the Police Commissioners of Boston.

And your petitioner alleges upon information and belief that shortly before the filing of the petition in bankruptcy, the said Tracy took forcible possession of, and has ever since retained possession of said license, claiming to have the right to do so by virtue of an assignment thereof given by the bankrupts to said Tracy.

And your petitioner represents that he is unable to say whether said Tracy is a creditor or a partner of said bankrupts, but he is informed and believes that said assignment of said license is void and of no effect, and was made in violation of the rules and regulations of the Police Board of Boston, and that the said Tracy well knew

that the said assignment was void at the time the same was executed.

And your petitioner represents that said license is practically the only asset, and of considerable value, belonging to the bankrupts, and that the value of said license is daily depreciating by reason of the fact that the rebate from the City of Boston is growing less each day.

And your petitioner represents that demand has been made upon said Tracy and his attorneys that said license be delivered to the estate of the bankrupts, but said demand has not been complied with.

51 Wherefore your petitioner prays:—

1. That said Robert J. Tracy be restrained from further continuing to act by virtue of said license, that any and all assignments under which he claims be declared null and void.

2. That said Tracy be ordered forthwith to assign, transfer and deliver over to your petitioner said license, and to execute such other papers or instruments as may be necessary to vest your petitioner with title to the same.

3. That said Tracy be ordered to account to your petitioner for any and all loss and damage which said estate has suffered by reason of his having wrongfully withheld from the estate said license.

4. For such other and further relief as this Honorable Court may direct.

ALBERT A. GINZBERG.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

BOSTON, *August* 30, 1903.

Then personally appeared before me Albert A. Ginzberg, and made oath that the foregoing statements by him subscribed are true to the best of his knowledge and belief.

DAVID A. LOURIE,
Justice of the Peace.

EXHIBIT 19.

District Court of the United States, District of Massachusetts.

In the Matter of H. C. LONG, Bankrupt. No. 7880.

ALBERT A. GINZBERG, Trustee,
vs.
ROBERT J. TRACY.

Now comes Robert J. Tracy and appears specially and denies the jurisdiction of this court and says that his interest is adverse to the trustee and was acquired before the proceeding in bankruptcy had begun, and that this court has no jurisdiction over him except by his consent which he hereby expressly refuses to give.

By His Attorney, H. J. JAQUITH.

52 EXHIBIT 20.

UNITED STATES OF AMERICA:

In the District Court of the District of Massachusetts.

HERMAN C. LONG ET AL., Bankrupts.

ALBERT A. GINZBERG, Trustee,
vs.
ROBERT J. TRACY.

Decree.

FEB. 12*th*, 1904—11.10 a. m.

The petition of the trustee against Robert J. Tracy having come on to be heard and after hearing counsel for the trustee and for respondent on the Question of Jurisdiction, it is ordered:

First: That any and all assignments executed by the bankrupts to the respondent purporting to convey or pledge their liquor license be and hereby are declared null and void.

Second: Said Robert J. Tracy, the respondent, be and hereby is ordered to forthwith assign, transfer and deliver to the trustee any and all licenses formerly owned by the bankrupt and to execute such other papers or instruments as may be necessary to perfect said trustee's title to said licenses or to enable him to sell or convey the same.

JAMES M. OLMSTEAD, *Referee.*

A true copy,
Attest:

JAMES M. OLMSTEAD,
Referee in Bankruptcy.

EXHIBIT 21.

District Court of the United States, District of Massachusetts.

In the Matter of H. C. LONG ET AL., Bankrupts. No. 7880.

GINZBERG, Tr.,
v.
TRACY.

Petition for Review.

Robert J. Tracy, the respondent, being aggrieved by the decision of the Referee assuming jurisdiction in the above petition of Ginzberg Trustee files this his petition for review and requests the
53 Referee to certify to the District Judge the record and his findings thereon in accordance with general Order xxvii of the

Supreme Court, not waiving but hereby specially insisting upon his refusal to submit the controversy to the jurisdiction of this court.

By his Att'y
H. J. JAQUITH.

EXHIBIT 22.

In the Matter of HERMAN C. LONG and FRANK A. SANDERSON
Bankrupts.

In Bankruptcy. No. 7880.

At Boston, in said district on the 28th day of March, A. D. 1904, upon the question certified to the Court by the Referee in said matter on the 17th day of March, A. D. 1904, now therefore, after hearing arguments of Alfred W. Putnam Esq., counsel for the trustee, and H. J. Jaquith Esq., of counsel for Robert J. Tracy, and after due consideration of the same:

It is hereby Ordered and Decreed that the judgment of the referee be, and it hereby is reversed, and the matter recommitted to him for further proceedings, without prejudice to the rights of parties to amend their pleadings and to introduce further testimony.

It is further ordered that the Clerk send a copy of this order by mail to the referee.

Witness the Honorable Francis C. Lowell, Judge of said Court and the seal thereof, this 28th day of March, A. D. 1904.

[Seal of District Court Massachusetts.]

F. S. FISKE,
Deputy Clerk.

A true copy.
Attest: WILLIAM NELSON,
Deputy Clerk.

54 EXHIBIT 24.

(Petition and Order for Sale of Perishable Property.)

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of Massachusetts.

In the Matter of H. C. LONG ET AL., Bankrupts.

In Bankruptcy. No. 7880.

Respectfully represents Albert A. Ginzberg, duly appointed trustee of the aforesaid bankrupts.

That a part of said bankrupts' estate, to wit: a liquor license held

by the bankrupts in the conduct of their business and a part of said estate is perishable and that there will be loss if the same is not sold immediately.

Wherefore he prays the court to order the same be sold immediately. Dated this 30th day of March A. D. 1904.

ALBERT A. GINZBERG, *Trustee.*

The foregoing petition having been duly filed, and having come on for a hearing before me, without notice to the creditors, now, after due hearing no adverse interest being represented thereat.

I find that the facts are as above stated and that the same is required in the interest of the estate and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this 29th day of March, A. D. 1904.

JAMES M. OLMSTEAD,
Referee in Bankruptcy.

EXHIBIT 25.

District Court of the United States, District of Massachusetts.

In the Matter of H. C. LONG ET AL., Bankrupts.

7880.

Robert J. Tracy, of the City, County and State of New York, prays leave to appear specially and to represent to this Honorable
55 Court that he is an adverse claimant to a liquor license issued to the bankrupts and himself by the Board of Police of the City of Boston; that said license, without the knowledge, consent or authority of the relator, was sold by the trustee as the relator alleges upon information and belief for the sum of three thousand ($3,000.) dollars and the relator was informed on Saturday, April 9, 1904, that the said trustee had paid out some six hundred ($600.) dollars of the proceeds and proposes to pay out the balance in dividends to creditors. Your relator shows that he has brought suit against said trustee in the Supreme Judicial Court of Massachusetts for Suffolk County to recover the proceeds of his license thus wrongfully disposed of by the trustee, and said suit is now pending.

Wherefore your relator respectfully prays that no payments by the trustee out of said fund be allowed or approved and that further proceedings in the matter — paying a dividend be suspended until the ownership of the license and its proceeds is determined by the Supreme Judicial Court of Massachusetts.

By His Attorneys, H. J. JAQUITH.
T. J. BARRY.

Upon the foregoing motion after hearing H. J. Jaquith, Esq., of counsel for Robert J. Tracy, and Albert A Ginzberg Esq., the trustee having intimated in open court his willingness to take the risk of

proceedings: It is ordered that said motion be, and it hereby is denied.

By Order of Court, April 11, A. D. 1904.

F. S. FISKE,
Deputy Clerk.

Statement of Evidence approved by Trial Justice.
Att.:
JOHN NOBLE, *Clerk.*

56 V.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

ROBERT J. TRACY, of the City, County, and State of New York, Plaintiff,

vs.

ALBERT A. GINZBURG, of Boston, County of Suffolk, and Commonwealth of Massachusetts, Defendant.

To the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for said County of Suffolk:

And now comes the said Robert J. Tracy and complains that manifest error hath appeared to the great damage of your petitioner, in the record and proceedings and also in the decree in a bill in equity between him and the defendant, Albert A. Ginzburg in the Supreme Judicial Court of said Commonwealth, holden in Boston, within and for said County of Suffolk, being the highest court of law in said State of Massachusetts in which a decision could be had in suit, and in which said court a final decree was rendered against the said Robert J. Tracy on the fifteenth day of November, A. D. 1905 in said suit, wherein was drawn in question a title, right, privilege or immunity specially set up and claimed by said Robert J. Tracy, and wherein was further drawn in question a title, right, privilege or immunity claimed under a statute of the United States and the decision was against the title, right, privilege or immunity specially set up and claimed by said Robert J. Tracy, and

57 wherein was further drawn in question the validity of a statute of and authority exercised under the said State of Massachusetts on the ground of their being repugnant to the laws of the United States, and the decision was in favor of such validity; all of which appears in the record and proceedings in said suit.

Wherefore your petitioner prays for a writ of error in said suit to issue in due form of law to the Supreme Court of the United States, to the end that said error shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf.

And your petitioner files herewith an assignment of errors which

set our separately and particularly each error asserted and intended to be urged.

And your petitioner further offers a supersedeas bond, in such sum and with such good and sufficient sureties as may be approved by a Justice of this Honorable Court, that the said Robert J. Tracy will prosecute his writ of error to effect and answer all damages and costs if he shall fail to make his plea good.

ROBERT J. TRACY,
By His Attorn*ies*, THOS. J. BARRY.
H. J. JAQUITH.

58 VI.

UNITED STATES OF AMERICA:

Supreme Court of the United States.

ROBERT J. TRACY, of the City, County, and State of New York, Plaintiff in Error,

v.

ALBERT A. GINZBURG, of Boston, in the County of Suffolk, and State of Massachusetts, Both as an Individual and as He is Trustee in Bankruptcy of the Joint and Separate Estate of Herman C. Long and Frank A. Sanderson, Defendant in Error.

Assignment of Errors by Plaintiff in Error.

And now comes Robert J. Tracy, plaintiff in error, and says that in the record and proceedings in the above entitled suit there is manifest error, in this, to wit:

1. That in said suit there was drawn in question a title, right, privilege or immunity claimed under the Fourteenth Amendment to the Constitution of the U. S. and the decision was against the title, right, privilege or immunity of the plaintiff in error specially set up or claimed under said Constitution, to wit, said Fourteenth Article.

2. That in said suit there was drawn in question a title, right, privilege or immunity, claimed under a statute of the United States, to wit, the Bankruptcy Act approved July 1, 1898, and amendments thereto, and the decision was against the title, right, privilege and immunity of the plaintiff in error specially set up, and claimed under said statute.

59 3. That in said suit there was drawn in question as enforced, the validity of a statute of the State of Massachusetts, to wit, Chap. 100 R. L. of Massachusetts and especially sections 17 to 20 inclusive on the ground of its being repugnant as enforced to Art. 1, Sec. 10 of the Con. of the U. S. and the decision was *a* favor of such validity of said Chap. 100 and more especially of Sec. 17 to 20 inclusive.

4. That in said bill in equity there was drawn in question the validity of an authority claimed and exercised by the board of Police

of the City of Boston under Ch. 100 R. L. of Mass. to determine the plaintiff's property rights on the ground that said board was not a judicial body and that its proceedings did not constitute due process of law and were repugnant to the Fourteenth Amendment to the Constitution of the U. S., and the decision was in favor of the validity of the said statute of Mass., and the authority exercised thereunder.

Wherefore the said Robert J. Tracy prays that the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk be reversed, and that the said Supreme Court of the United States may cause further to be done to correct said error what of right and according to the laws and customs of the United States should be done.

ROBERT J. TRACY,
By His Attorn*ies*, THOS. J. BARRY.
H. J. JAQUITH.

60 VII.

COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *November* 10, 1905.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Robert J. Tracy *vs.* Albert J. Ginzberg decided on the 18th day of October, 1905.

HENRY WALTON SWIFT,
Reporter of Decisions.

61 KNOWLTON, *C. J.:*

The money which the plaintiff seeks to recover was received by the defendant as a trustee in bankruptcy, on account of a privilege which the board of police commissioners of Boston allowed to the bankrupts, as the holders of two liquor licenses which were in force at the commencement of the proceedings in bankruptcy. The plaintiff contends that he is entitled to the money as the assignee of the interest of the bankrupts in the licenses, and as a joint licensee with them, his name being joined with theirs in the licenses, not because he was a partner in the business which they were conducting, but to furnish security for money that his principal had advanced to pay for the licenses.

A license to sell intoxicating liquor, under the R. L. c. 100, is a personal privilege, which may be valuable as property, in a certain sense, for the personal use of the holder, but which is not assignable or transferable by him in any way. The R. L. c.
62 100, §20, provided for refund*ing* a part of the money paid for a license, if the licensee died before the expiration of the year for which the license was granted, and this section was amended by the St. 1902, c. 171, giving authority to the licensing board to issue another license of the same kind for the remainder of the year, when the license is surrendered and cancelled before the ex-

piration of its term. It was also further amended by the St. 1905, c. 206. In such a case the board may, in its discretion, give a certificate to the party who holds the first license, entitling him to have a part of the fee proportionate to the unexpired term of the license returned, by the treasurer of the city or town, from the fees thereafter received by him for licenses to sell intoxicating liquors. But the statute gives the holder of a license no right in reference to the granting of a future license after the expiration of the term for which he is licensed.

It appears from the evidence and the findings of the judge, in this case, that the police commissioners of Boston have been accustomed to recognize, to some extent, the position of a holder of a license who wishes to go out of business and to transfer the property used in the business, as entitling him to nominate as an applicant for a new license of the same kind, in the same place, a successor to his business, whose application will be considered and passed upon by the board. In like manner the board has been accustomed to consider an application for a license, made on a nomination by a bankrupt or by his trustee, if it is understood that every thing received as a consideration for the nomination will be distributed pro rata among the creditors. But the board
63 has never been accustomed to recognize, in any way, assignments of licenses as security, or otherwise than in connection with a nomination of a successor by one going out of business. Because of this practice of the police commissioners, such a nomination in the city of Boston, under favorable conditions, has come to be recognized there as having a substantial pecuniary value. Because money can be obtained for it, although it gives one no legal rights, and is simply a recommendation to the favorable consideration of the board, the court of bankruptcy will compel a bankrupt to sign a release of his license, so that the trustee may obtain what he can, for the possible succession, for the benefit of the creditors. *In re* Fisher, 98 Fed. Rep., 89. Cushman *v.* Fisher, 103 Fed. Rep. 860. Schaefer Brewing Co. *v.* Moebs, 187 Mass. 571. But the value of the release is recognized as depending wholly upon the practice of the police commissioners, and because there is no legal right to assign the privileges of such a license, and the police commissioners refuse to be bound by assignments, or to recognize at all assignments for security, the court holds that a holder of an assignment for security has no rights under the assignment. *In re* McArdle, 126 Fed. Rep., 442.

The recognition by the police commissioners of a nomination for appointment is necessarily subject to a variety of conditions, which the law imposes upon them in the performance of their official duties. When an application for a new license is made, they must determine whether the interests of the public require that a license should be granted for the sale of liquors in that place for another year. This involves, to some extent, the question how many licenses shouid be granted. By the statute the number that may be
64 granted is limited, but the board is not required to grant the whole number that the law permits. In any year, as the time

comes for granting new licenses, the board may determine that the interests of the public require a diminution of the number; or they may determine that, if the number remains the same, it is better that the business should be discontinued in a certain place and licensed in other places. If they determine that the place, as compared with other places, is suitable, they may find that the applicant is not a trustworthy and fit person to be licensed. These and perhaps other considerations, illustrate the fact that neither the application of the licensee for a renewal of his license at the expiration of the year, nor his nomination of a successor as an applicant for a license, if he wishes to go out of the business has any binding force, or gives any legal right as against the licensing board. They must perform their duties as public officers, acting in the interest of the people.

In the present case the release or assignment of the licenses by the bankrupts to one who wishes to obtain licenses for the next year, induced him to pay the trustee in bankruptcy three thousand dollars. The money so received was not for any property owned by the plaintiff. It was for a position before the police commisioners, from which the payor had reasonable ground to expect their favorable action. The plaintiff could not control this position, or do anything that would induce the payment by O'Hearn of the money which the defendant received.

Upon the facts shown, the board of police commissioners did not consider the insertion of the plaintiff's name in the original
65 license as affecting their right to issue new licenses. It is plain that they were right as regards the licenses for the ensuing year. Whether they were right or not in regard to the plaintiff's relation to the old licenses is immaterial, for it is plain that the money received by the defendant was not paid on account of the plaintiff's interest, but on account of what the defendant did in enabling O'Hearn to obtain the new licenses.

Decree affirmed.

65½ [Endorsed:] Tracy *vs.* Ginsberg. Certified Copy of the Opinion of the Supreme Judicial Court.

66 VIII.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Albert A. Ginzberg of Boston in the State of Massachusetts, both as an individual and as trustee in bankruptcy of H. C. Long & Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the City of Washington, District of Columbia, on the *fifteenth day of February, next, pursuant to a Writ of Error filed in the Clerk's Office of the †Supreme Judicial

Court of the State of Massachusetts wherein Robert J. Tracy of the city and state of New York is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Marcus P. Knowlton, Chief Justice of the Supreme Judicial Court of the State of Massachusetts, this 18th day of January, in the year of our Lord one thousand nine hundred and six.

MARCUS P. KNOWLTON.

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*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

Due and sufficient service of the above citation is hereby accepted.
ALBERT A. GINZBERG,
By His Att'y, ALFRED W. PUTNAM.

[Endorsed:] Putnam, 60 State St.

67 Supreme Judicial Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

I John Noble, Clerk of the Supreme Judicial Court within and for the County of Suffolk, hereby certify that the foregoing are true copies of

III. The record in the case of Robert J. Tracy of New York in the County and State of New York, Plaintiff, *v.* Albert A. Ginzberg of Boston in the County of Suffolk aforesaid, both as individual, and as he is Trustee in Bankruptcy of the joint and separate estates of Herman C. Long and Frank A. Sanderson, Defendant. In Equity, in said Supreme Judicial Court determined; and Annexed to and transmitted with said Record, of

IV. The evidence before the Full Court;

V. The Application for Writ of Error; and

VI. The Assignment of Errors.

68 VII. The Opinion of the Full Court; and of all the proceedings in said case, with all things concerning the same. together with

VIII. The Original Citation and the acceptance of service, thereon.

In witness whereof I have hereunto set my hand and the seal of said Court this thirty first day of January in the year of our Lord, One thousand nine hundred and six.

[SEAL.] JOHN NOBLE, *Clerk.*

68½ Know all men by these presents that I, Robert J. Tracy of the City, County and State of New York hereby constitute and appoint H. J. Jaquith of Boston in the County of Suffolk and

State of Massachusetts true and lawful Attorney, for me and in my name and stead, to claim a Writ of Error from the Supreme Court of the United States to the Supreme Judicial Court of Massachusetts in the case of Robert J. Tracy plaintiff against Albert A. Ginzberg as an individual or as trustee in bankruptcy of H. C. Long & Company, and to sign all papers necessary thereto, including such supersedeas bond as may be required under the laws of the United States.

Hereby granting unto him, said Attorney, full power and authority to act in and concerning the premises as fully and effectually as I might do if personally present.

In witness whereof, I hereunto set my hand and seal this fifteenth day of November in the year one thousand nine hundred and five.

ROBERT J. TRACY. [SEAL.]

Signed and sealed in presence of
DAN'L M. TRACY.

69 Know all men by these presents, that we, Robert J. Tracy of the City and State of New York as principal, and the American Surety Company of New York, a corporation existing under the laws of the State of New York, and having an office and usual place of business in Boston, in the County of Suffolk, and Commonwealth of Massachusetts, as surety, are held and firmly bound unto Albert A. Ginzburg of Boston, in the County of Suffolk and State of Massachusetts as an individual and as trustee in bankruptcy of the joint and separate estate of Herman C. Long and Frank A. Sanderson in the full and just sum of $500. to be paid to the said Albert A. Ginzburg as aforesaid, his attorney, executors, administrators, assigns, or successors; to which payment, well and truly to be made, we bind ourselves our heirs, executors, and administrators jointly and severally, by these presents.

Sealed with our seals and dated the 16th day of November, in the year of our Lord one thousand nine hundred and five.

Whereas lately, on the fifteenth day of November now last past in the Supreme Judicial Court, holden at Boston within and for said County of Suffolk, in a bill in equity pending in said Court between said Robert J. Tracy, plaintiff and said Albert A. Ginzburg as aforesaid, defendant, a final decree was entered against the said Robert J. Tracy, and said Robert J. Tracy having procured a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Albert A. Ginsburg as aforesaid, citing and admonishing him
70 as aforesaid to be and appear at a Supreme Court of the United States to be holden at Washington on the twelfth day of December next.

Now, the condition of the above obligation is such that if the said Robert J. Tracy shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the

above obligation to be null and void; otherwise to remain in full force and virtue.

ROBERT J. TRACY, [SEAL.]
By His Att'y, H. J. JAQUITH.
AMERICAN SURETY COMPANY OF NEW YORK,
By ELIPHALET F. PHILBRICK,
[SEAL.] *Resident Vice-President.*

Attest:
JOHN W. DERRICK,
Resident Ass't Secretary.

Approved.
MARCUS P. KNOWLTON, *C. J. S. J. C.*

A true copy of said Bond.
Attest:
JOHN NOBLE, *Clerk.*

[Endorsed:] Bond filed and approved January 18, 1906. Att: John Noble, Clerk

Endorsed on cover: File No. 20,094. Massachusetts supreme judicial court. Term No. 204. Robert J. Tracy, plaintiff in error, vs. Albert A. Ginzberg, individually and as trustee in bankruptcy of H. C. Long & Company. Filed February 10, 1906. File No. 20,094.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 204.

ROBERT J. TRACY,
PLAINTIFF IN ERROR,

v.

ALBERT A. GINZBERG, Individually and as Trustee in Bankruptcy of H. C. Long & Company.

Brief of Plaintiff in Error.

In Error to the Supreme Court of Massachusetts.

Statement of Case.

This is a bill in equity, brought in the Supreme Court of Massachusetts to follow and retake a fund alleged to have been derived from the plaintiff's property. The defendant is a trustee in bankruptcy, and the relief sought against him as such trustee is a decree establishing the plaintiff's rights to the fund.

The plaintiff, as the secretary of the Everard Breweries Company, loaned capital to the bankrupts, Long and Sanderson, and took a mortgage back on the stock and fixtures

of the dining room and bar which were purchased by Long and Sanderson. He also bought from the holder of a license the good-will and privilege of applying for a reissue of the license to sell liquors; and thereafter the plaintiff in error applied to the board of police of Boston for a transfer and reissue to him, jointly with Long and Sanderson, of the liquor licenses so purchased. This was granted by the board of police, and the license was issued in the name of the three applicants. The plaintiff paid the license tax to the city of Boston for that year, and immediately his associates, Long and Sanderson, assigned to him their interests in the licenses and covenanted not to apply for a reissue except in the names of the three so long as the debt to Everard Breweries Company was unpaid. A year later, all three applied for a reissue in the joint names, and obtained new licenses again in the names of all three. The plaintiff in error paid the license tax and again took an assignment of his associates' interests in the license and a covenant that all reissues would be applied for in the name of all three so long as the debt to Everard Breweries Company was unpaid. About three months thereafter Long and Sanderson, doing business as H. C. Long & Company, were adjudicated bankrupts, and the defendant claimed the licenses as the property of the estate. The plaintiff in error refused to assent to the jurisdiction of the referee in bankruptcy, and the district judge reversed the referee, who, nevertheless, without notice to creditors or the plaintiff in error, and on the pretext that the licenses were perishable property, authorized the trustee in bankruptcy to sell the licenses. This the defendant in error did without the knowledge or assent of the plaintiff, receiving three thousand dollars for them. The licenses were in the possession of the plaintiff, who refused to give them up, and thereafter

the board of police, without notice to the plaintiff in error, or charges or hearing, cancelled the licenses and issued new ones to the nominee of the defendant in error.

The plaintiff in error demands the three thousand dollars as derived from the sale of his property or as the damages he has suffered by the breach of the bankrupt's covenants, which were the consideration for the advancement of the various sums of money to purchase the licenses and pay the taxes. (Record, pp. 12–38.)

Jurisdiction.

At the trial before the single justice the plaintiff requested rulings which the Court declined to make as follows (Record, p. 25): —

1. That the plaintiff's right in the license issued jointly to him and to Long & Sanderson, who subsequently assigned their interest to him, was a vested property right within the meaning of article 14 of the Constitution of the United States.

2. That the police commission of the city of Boston is not a judicial body, and its acts in dealing with the plaintiff's rights do not constitute due process of law within the meaning of article 14 of the Constitution of the United States.

3. That the plaintiff's contract with Long & Sanderson for assignment of licenses, and that they should make no application for a renewal of the licenses except to themselves and Tracy, was a vested, a property right, and is protected by the Constitution of the United States, article 14.

4. That the defendant, Ginzberg, as trustee in bankruptcy, is bound by the assignments and covenants of Long

& Sanderson with relation to this license as fully as the bankrupts were.

"The Court: The first prayer the plaintiff asks — I shall not give that.

"Second: I do not see that that is material.

"Third: Well, if it is, it does not affect the question.

"Fourth: I do not think that is so."

These requests were also presented to the full bench at the hearing on appeal, being printed in plaintiff's brief as follows: —

Requests for Rulings.

The plaintiff respectfully requests the following rulings: —

1. That the plaintiff's right in the license issued jointly to him and to Long & Sanderson, who subsequently assigned their interest to him, was a vested property right within the meaning of article 14 of the Constitution of the United States.

2. That the police commission of the city of Boston is not a judicial body, and its acts in dealing with the plaintiff's rights do not constitute due process of law within the meaning of article 14 of the Constitution of the United States.

3. That the plaintiff's contract with Long & Sanderson for assignment of licenses, and that they should make no application for a renewal of the licenses except to themselves and Tracy, was a vested, a property right, and is protected by the Constitution of the United States, article 14.

4. That the defendant Ginzberg, as trustee in bank-

ruptcy, is bound by the assignments and covenants of Long & Sanderson with relation to this license as fully as the bankrupts were.

5. That if the Court shall find that the board of police of Boston acted within their powers in adopting rules denying validity to the plaintiff's contracts with Long & Company, that the law conferring such powers upon the police board is null and void under article 1, section 10, of the Constitution of the United States in that it authorizes the impairment of the obligation of contracts.

Errors Assigned. (Record, p. 39.)

The plaintiff in error, in his bill of complaint, asserted contractual rights in a license issued under authority of a law of Massachusetts and subsequent contracts with the bankrupts and their breach by the defendant in error, the representative of the bankrupts.

The plaintiff in error submits that his contract with the bankrupts that all applications for a reissue should be in the name of all the licensees until the debt to the Everard Breweries Company was paid, and the assignment to him of all of his co-licensees' interests in said license, were lawful valid contracts which the plaintiff in error, a citizen of the state of New York, had a right, privilege, and immunity to make and to have enforced in the courts of the state of Massachusetts, and he assigns this as his first assignment of error, namely, that the decision of the Massachusetts court was against such title, right, privilege, or immunity:

1. That in said suit there was drawn in question a title, right, privilege, or immunity claimed under the fourteenth amendment to the Constitution of the United States, and

the decision was against the title, right, privilege, or immunity of the plaintiff in error specially set up or claimed under said Constitution, to wit, said fourteenth article.

The plaintiff in error also submits that, as against the bankrupt's estate, his rights, privileges, and immunities were fixed by the United States bankruptcy act, and that under said act the defendant in error took no higher, other, or better title than the bankrupts retained in themselves after entering into the covenants set out in this record; and the denial by the Massachusetts court of the rights of the plaintiff in error, as established by the United States bankruptcy act, was a decision against a title, right, privilege, and immunity claimed under a statute of the United States, and is his second assignment of error:

2. That in said suit there was drawn in question a title, right, privilege, or immunity, claimed under a statute of the United States, to wit, the bankruptcy act approved July 1, 1898, and amendments thereto, and the decision was against the title, right, privilege, and immunity of the plaintiff in error specially set up and claimed under said statute.

The plaintiff in error further shows that it was admitted athe hearing in the state court that the plaintiff in error was a party to the licenses; that he was in possession of the licenses and refused to give them up; that the licenses were issued for a large and valuable consideration, and were issued under the terms of Revised Laws of Massachusetts, c. 100, secs. 17 to 20, as follows: —

Condition of Licenses.

Section 17. Each license shall be expressed, to be subject to the following conditions: —

First, That the provisions in regard to the nature of

the license, and the building in which the business may be carried on under it, shall be strictly adhered to.

Second, That spirituous or intoxicating liquor shall not be sold between the hours of eleven at night and six in the morning or on the Lord's Day; but if the licensee is also licensed as an innholder he may, between the hours of six in the morning and eleven at night on the Lord's Day, supply such liquors to guests who have resorted to his inn for food or lodging.

Third, That spirituous or intoxicating liquor shall not be sold, exchanged or delivered, or exposed, offered or kept for sale, exchange or delivery, upon the licensed premises, unless it is of good standard quality and is free from any adulteration prohibited in the Pharmacopœia of the United States or by the laws relative to adulteration of drugs and food, for either a food or a drug. If it is marked, labelled or represented as being the product of any foreign country it shall also be of the standard quality required for its legal sale for domestic use in the country of its reputed production. All such liquors which are sold exchanged or delivered, or which are exposed or kept for sale, exchange or delivery, under a license of the sixth class shall be of the quality required for their sale as drugs under the provisions of the laws relative to the adulteration of drugs and food.

Fourth, That liquor shall not be sold or delivered on the licensed premises to a person who is known to be a drunkard, to an intoxicated person, or to a person who is known to have been intoxicated within the six months last preceding, or to a minor, either for his own use, the use of his parents or of any other person, or unless upon the prescription of a duly registered physician to a person known to have been supported in whole or in part by

public charity at any time during the twelve months last preceding the date of the license.

Fifth, That there shall be no disorder, indecency, prostitution, lewdness or illegal gaming on the licensed premises or on any premises connected therewith by an interior communication.

Sixth, That the license, or a copy thereof, certified by the recording officer of the licensing board or by the clerk of the city or town by which it is issued, shall be displayed on the premises in a conspicuous position, where it can easily be read.

Seventh, That the license shall be subject to forfeiture, as herein provided, for breach of any of its conditions; and that, if the licensee is convicted of a violation of any of such conditions, his license shall thereupon become void.

Each license of the first five classes shall be subject to the further condition that the licensee shall not sell, give away or deliver on the licensed premises any intoxicating liquors on a legal holiday as defined in section 5 of chapter 8, or on any day on which a national, state, city or annual town election is held in the city or town in which the licensed premises are situated; except the day of an election in a city if such election is not required to be held in the ward in which the licensed premises are situated: but this condition shall not apply to a wholesale druggist who, on the day of an election as aforesaid, sells, gives away or delivers intoxicating liquors on the licensed premises, nor to an innkeeper who sells, gives away or delivers in his inn any intoxicating liquor to a guest who has resorted to his inn for food or lodging, but an innkeeper shall not upon such holiday sell, give away or deliver intoxicating liquor in his inn under a fourth or fifth class license.

Each license of the first three classes shall be subject to the further condition that the licensee shall hold a license as an innholder or common victualler, and that he shall not serve any spirituous or intoxicating liquor at a table or tables in any room in which the exclusive or principal business carried on is the sale of such liquors.

Each license of the first three classes issued to a common victualler shall specify the room or rooms in which such liquor shall be kept or sold, and the holder of such license shall not keep, sell or deliver any such liquors in any room or part of a building not so specified.

Each license of the second, third, fifth, or seventh class shall be subject to the further condition that no spirituous or intoxicating liquors except those the sale of which is allowed by the license shall be kept on the licensed premises.

Classes of Licenses.

Section 18. Licenses shall be of the following classes:

First Class. To sell liquors of any kind, to be drunk on the premises.

Second Class. To sell malt liquors, cider and light wines containing not more than fifteen per cent of alcohol, to be drunk on the premises.

Third Class. To sell malt liquors and cider, to be drunk on the premises.

Fourth Class. To sell liquors of any kind, not to be drunk on the premises.

Fifth Class. To sell malt liquors, cider and light wines containing not more than fifteen per cent of alcohol, not to be drunk on the premises.

Sixth Class. Licenses to retail druggists and apothecaries to sell liquors of any kind for medicinal, mechani-

cal or chemical purposes only, and to such persons only as may certify in writing for what use they want them.

Seventh Class. Licenses to dealers in paints or in chemicals to sell alcohol for mechanical, manufacturing or chemical purposes only.

Fees for Licenses.

Section 19. The fees for licenses shall be as follows: —

For a license of the first class, not less than one thousand dollars.

For a license of the second or third class, not less than two hundred and fifty dollars.

For a license of the fourth class, not less than three hundred dollars.

For a license of the fifth class, not less than one hundred and fifty dollars.

For a license of the sixth class, or seventh class, one dollar.

Section 20. If a licensee dies before the expiration of the term of his license, the city or town by which it was granted may refund to his executor or administrator a part of the license fee, proportionate to the unexpired term of the license, and a proportionate part of the percentage which has been paid to the commonwealth shall be refunded to the city or town.

Yet nevertheless, with full knowledge of the claims of the plaintiff in error, but without any charges or notice or hearing, the board of police cancelled the licenses in the possession of the plaintiff in error without any compensation for his damages. This procedure having been held by the Massachusetts court to be within the powers conferred by the aforesaid chapter 100, sections 17 to 20,

the plaintiff alleges that said sections as enforced are repugnant to the Constitution of the United States, and assigns this as his third assignment of error:

3. That in said suit there was drawn in question as enforced, the validity of a statute of the state of Massachusetts, to wit, chapter 100, Revised Laws of Massachusetts, and especially sections 17 to 20, inclusive, on the grounds of its being repugnant as enforced to article 1, sec. 10, of the Constitution of the United States and the decision was in favor of such validity of said chapter 100 and more especially of sections 17 to 20, inclusive.

The plaintiff in error submits that the board of police of Boston is a non-judicial body, and that its acts did not constitute due process of law, and that in so far as the Supreme Court of Massachusetts has made those acts the foundation of its judgment, treating them as final and unreviewable, it is a deprivation of the plaintiff of his property without due process of law. The denial of the property right of the plaintiff in error by the board of police, and the decision of the state court affirming the right of the board of police to make the decision, is assigned as error in his fourth assignment:

4. That in said bill in equity there was drawn in question the validity of an authority claimed and exercised by the board of police of the city of Boston under chapter 100, Revised Laws of Massachusetts, to determine the plaintiff's property rights on the ground that said board was not a judicial body and that its proceedings did not constitute due process of law and were repugnant to the fourteenth amendment to the constitution of the United States, and the decision was in favor of the validity of the said statute of Massachusetts and the authority exercised thereunder.

Argument.

The determination of the controversies involved in this case does not call for any review of the power of a state to regulate or prohibit callings involving, in the judgment of the legislature, public health, morals, or safety, nor yet the ministerial discretion of licensing boards to determine finally the fitness of an applicant for a license.

This case does not raise the question of a licensee's right to assign to a stranger, but the right to assign to a co-licensee who has been accepted by the board of police and found fit to exercise the trade named in the license.

In the case presented to the Court the law had been thrice acted under and the discretion of the licensing board in approving of an applicant had been exercised; the only test the law allows (Rev. Laws, Mass. c. 100, sec. 16) is the "fitness" of the person, and the person had been found "fit" in each instance.

The federal question having been seasonably raised, the first question requiring decision is the nature of the right acquired by Tracy when he became one of three grantees of the liquor license issued by the board of police December 23, 1902.

I.

What is a License?

The present use of the term "license," as an act of government, in many respects is synonymous with "franchise."

Kent defines a franchise as a privilege conferred by grant from government and vested in individuals (3 Kent Com. 458), and C.J. MARSHALL, in *Gibbons* v. *Ogden* (9 Wheat. 1, 213), thus defines a license:

> "The 4th section directs the proper officer to grant to a vessel qualified to receive it, 'a license for carry-

ing on the coasting trade;' and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, 'license is hereby granted for the said steam-boat Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer.'

"These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act, than in the license itself.

"The word 'license' means permission or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license."

It would seem, therefore, that the difference between a governmental franchise and a governmental license is one of degree and not of species, and that the same principles of law control dealings in governmental privileges, whether franchise or license when the fee exacted for the license is more than the nominal sum required to cover the cost of registration.

A license for a stated period and for a valuable consideration cannot be revoked except for breach of conditions.

Davis v. *Townsend*, 10 Barb. 333, 343.
Cook v. *Stearns*, 11 Mass. 533, 537.
Comm. v. *Moylan*, 119 Mass. 109.

It is a franchise.

State v. *C. M. & St. P. Ry.*, 56 Wis. 256, 259.
Wiggins Ferry Co. v. *E. St. Louis*, 102 Ill. 560, 576.
Hancock v. *Singer Mfg. Co.*, 62 N.J. Law, 289, 335.
Logan v. *Pyne*, 43 Iowa, 524.
Comm. v. *Standard Oil*, 101 Pa. St. 119, 145.
State v. *Schlier*, 59 Tenn. 280, 286.

The power to mortgage is co-extensive with the power to alienate, and is an incident that cannot be divorced from ownership.

Comm. v. *Smith*, 10 Allen, 448.

The only limitation upon this power is that the holder of a franchise or license for the benefit of the public cannot do anything to disqualify him from performing his public duties.

Evans v. *Boston Heating Co.*, 157 Mass. 37.

In the case at bar the evidence shows that the police board has always recognized the power of alienation and its market value, although the plaintiff does not hinge his rights upon such recognition. The rights existing and being recognized, the legislature alone could prohibit the assignment or equitable mortgaging of the privilege; the only power of the police board is to determine the fitness of the applicant for the new license in substitution for the one surrendered for cancellation. (Record, pp. 16–25.)

A license is property.

This has been determined by many courts and in many jurisdictions. "The word property is legally understood to include every class of acquisitions which a man can own or have an interest in."

In re Fixen, 102 Fed. Rep. 295, 296.
In re Emrich, 101 Fed. Rep. 231, market license.
In re Gallagher, 16 Blatch. 410 (J. BLATCHFORD).
Fisher v. *Cushman*, 103 Fed. Rep. 860, 864, 865 (C.C. A. 1st).
In re Becker, 98 Fed. Rep. 407.
In re Brodbine, 93 Fed. Rep. 643.

And other privileges are regarded as property.

In re Hurlbutt Hatch Co., 135 Fed. Rep. 504.
Hyde v. *Woods*, 94 U.S. 523, 525, (stock exchange).
Sparhawk v. *Yerkes*, 142 U.S. 1, 12.
In re Ketchum, 1 Fed. Rep. 840.
In re Warder, 10 Fed. Rep. 275.

A privilege is intangible property, and is recognized and protected as property.

Adams Ex. Co. v. *Ohio*, 166 U.S. 185, 218, 219.

The record of the United States bankruptcy court, so far as it is material, appears in the record here, and the Supreme Court of Massachusetts at *nisi prius* and in *banc* was bound to give full faith and credit to its decrees.

The bankruptcy court did not split hairs, but undertook

to administer the license as property, and ordered a sale of the license, not that the trustee should obtain money for a nomination which the bankrupts never possessed, and hence was not in any sense derived from them. These decrees, being given full faith, dispose of the refinements sought to be injected as facts to deprive the plaintiff in error of his property.

For it would seem that no reasonable answer can be framed to the plaintiff's contention that it was his property which the trustee dealt with, and from which the fund in controversy was derived.

If we accept the federal decisions that it was a property right which the bankrupts might have exercised for their own benefit, then it follows that by appropriate instruments not obnoxious to the bankruptcy act, as preferences the bankrupts might bind themselves as to any acts, not unlawful in themselves, which it was possible for them to do or perform relating to the license, and might encumber or assign any prospective income from the privilege, whether from carrying on the business or from converting it into cash at the conclusion of the business.

What could be more honest or free from taint than the transaction set out in the record?

The bankrupts lacked capital, the plaintiff in error, or the corporation whose representative he is, bought the license, had it transferred to the bankrupts and the plaintiff in error, and then paid two yearly license fees as they became due. To give it some protection the bankrupts assigned their rights to the plaintiff in error until the money was repaid, and covenanted not to apply for a reissue except in the joint names of the three, and to assign all renewals to the plaintiff in error until the money was repaid. It is admitted that the money has not been repaid.

May we not test out the fallacy of the opinion and decision of the Massachusetts Supreme Judicial Court, by considering several other contingencies that must be governed by the same principles?

Suppose that the firm of Long & Company were solvent, but that one of the partners was insolvent: would not the bankruptcy court compel the solvent firm to account for the license as property?

Suppose that one of the partners of Long & Company had died: would not the survivor be compelled to account for the firm capital in the license as well as that invested in the stock in trade?

Suppose that the partnership of Long & Company was dissolved, and one partner was to sign in liquidation: would not any equity court compel this liquidating partner to account for the proceeds of the license? Would it hold good a defence that the liquidating partner had not sold the license, but had sold only a nomination, and that the licensing board had told him it would not accept a nomination from the other partner?

The opinion of the Massachusetts Supreme Judicial Court is largely devoted to discussing a point not in controversy, that is, the power of the board of police to ignore a nomination. This is conceded, but the plaintiff in error is not seeking to control the board of police; he is seeking to recover money obtained by the trustee in bankruptcy by intermeddling and destroying the plaintiff's property by a breach of the covenants of the bankrupts.

Nor is it an answer to the plaintiff's claim on the fund to say that the police board would not listen to a nomination by the plaintiff. That issue has not been tried, and it is by no means certain that a public board may not be compelled to deal with valuable privileges upon principles of

law and equity, treating all on the same level and prohibiting them from adopting arbitrary rules denying the attributes of property to what the courts have recognized to be property. They are at liberty to apply the tests set up by the legislature. They are not entitled to penalize lawful contracts.

The Massachusetts Supreme Judicial Court does not seem to have fully determined for itself in just what position before the law the capital invested in licenses stands. Surely the several millions of capital invested in licenses in Boston is within the protection of the law.

Tehan v. *Court*, 191 Mass. 92.

II.

The Trustee's Interest.

A trustee in bankruptcy is bound by all the agreements of the bankrupt as fully as the bankrupt except as to frauds and preferences and executory contracts; and in taking over property or property rights, he takes them subject to such liens, encumbrances, or assignments as existed prior to the bankruptcy, provided they are not obnoxious as frauds or preferences.

Mitchell v. *Winslow*, 2 Story, 630 (Fed. Cas. 9,673).

Ex parte Newhall, 2 Story, 360 (Fed. Cas. 10,159).

Fletcher v. *Morey*, 2 Story, 555 (Fed. Cas. 4,864).

Windsor v. *Kendall*, 3 Story, 507 (Fed. Cas. 17,886).

Windsor v. *McClellan*, 2 Story, 492 (Fed. Cas. 17,887).

Ex parte Dalby, 1 Lowell, 431 (Fed. Cas. 3,540).
Potter v. *Coggeshall* (Fed. Cas. 11,322).
Coggeshall v. *Potter* (appeal), (Fed. Cas. 2,955).
Williamson v. *Colcord* (Fed. Cas. 17,752).

These cases have been approved and followed by the United States Supreme Court and by the courts of most of the states.

Thompson v. *Fairbanks*, 196 U.S. 516, 526.

Upon these authorities the plaintiff was entitled to the aid of a court of equity to enforce his rights against Long & Company as fully as though they had not gone into bankruptcy.

The trustee having obtained an order to sell the license secretly and without notice to the plaintiff, on the false assumption that the license was perishable property, the day after the United States district judge reversed the finding of the referee declaring the assignment to the plaintiff null and void, and having immediately sold the license and received the proceeds, the plaintiff is equally entitled to the aid of a court of equity to recover the fund derived from his property. (Record, pp. 32–38.)

It is to be noted that no decision draws the refinement of the trial justice in severing the nomination from the sale of the license; in all cases and in the case at bar the order is to sell the license, and not to nominate a successor for a consideration.

The plaintiff, upon the bankruptcy, took possession of the business and of the printed licenses, and continued the authorized business; he was actually in possession and

enjoying the privileges when the license was cancelled in March, and refused to surrender it to be cancelled when requested so to do by the police board; hence their act, no matter how they state it, was a revocation of the plaintiff's license without cause.

Equally the plaintiff had a right to contract relative to the license; not only is the privilege a property right, but the contracts founded on the loan of money and the purchase of the old license to be cancelled are property rights.

III.

A License is Property Protected by the Federal Constitution.

The Supreme Court of the United States, in *Ward* v. *Maryland* (12 Wall. 418, 430), defined the privileges and immunities of citizens under article IV, sec. 2, of the Constitution, so far as those words were applied to the case being determined, and used language apparently covering this case.

It "Protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation, to acquire personal property, to take and hold real estate."

In *United States* v. *Cutting* (3 Wall. 441, 443) the same Court held that the payment of the tax constituted permission for the term. "The persons on whom this tax is assessed receive what is called a license, which is the evidence of permission to exercise such trade or calling in consequence of payment of this tax or duty."

And later the Court held that, although taxation and regulation of traffic were both sought in the one license,

still the license was not a privilege alone, but also a contract for a consideration.

Gundling v. *Chicago*, 177 U.S. 183, 188, 189.

And such licenses are property.

In re Fixen, 102 Fed. Rep. 295, 296.

And, like any other contract or vested property right, are protected by the fourteenth amendment of the United States.

Scranton v. *Wheeler*, 179 U.S. 141, 155.
City Monongahela Nav. Co. v. *United States*, 148 U.S. 312.

> "The franchise is a vested right. The State has power to grant it. It may retake it, as it may take other private property for public uses, upon the payment of just compensation."

This property of the plaintiff, this equitable right of the plaintiff to have his contract as to reapplication enforced, has been taken from him, not by the United States district court, for there the order of the referee was reversed, but by the police board of Boston, who set up a rule of theirs that they will not, under certain conditions, recognize such rights, and the defendant sets up such rule as a defence to this action.

The plaintiff urges that the board of police, possessing only ministerial functions, exercising discretion, but not judicial powers, went beyond its powers when it invaded the legislative function and prescribed a rule involving anything but the fitness of the applicant, a rule as to property and not as to the person. This rule is obnoxious to the federal decisions in —

Allgeyer v. *Louisiana*, 165 U.S. 578, 589.
Yick Wo v. *Hopkins*, 118 U.S. 356.
C., B. & Q. Ry. v. *Chicago*, 166 U.S. 226, 233, 241.

It cannot have been the intent of the legislature to turn licensing over to the police board of Boston with the broad fiat to do anything they chose, and it cannot be that our courts will hold that ministerial discretion gives them a greater power than the legislature conferred. Regulations, to be constitutional, must be reasonable, and reason is not arbitrary. The licenses of Boston represent $3,000,000 to $5,000,000 of capital invested as bonuses, and the annual tax income approximates $2,000,000. Law must govern the holding and transfer of this large property and not the whim of a lay board not selected for its conspicuous knowledge of the law.

The plaintiff is not seeking to coerce the board of police in any manner; they have found a fit person who has paid $3000 to the defendant; the condition that the $3000 should be distributed to the bankrupts' creditors is a corrupt condition, beyond their powers, and void; the board had no judicial power to pass on the plaintiff's rights.

The sound discretion allowed to a state under its police powers to regulate a trade or calling does not extend to contracts not prohibited by the legislature; these must be given their full effect or the action amounts to a deprivation of property without due process of law.

Hartford Ins. Co. v. *Chicago Ry.*, 175 U.S. 91, at page 100.

When the board of police deal with a personal privilege their judgment as to the fitness of an applicant cannot be

influenced or reviewed by a court, but when they deal with a property right they cannot act arbitrarily or refuse to act within the legal lines of their duty without subjecting themselves to the judicial power.

Supervisors v. *United States*, 4 Wall. 435, 446.
(C.C.A.) *United States* v. *Cornell S. Co.*, 127 Fed. Rep. 455.

IV.

Jurisdiction of State Court.

The Massachusetts Supreme Court had complete jurisdiction.

Scott v. *Kelley*, 22 Wall. 57.
Bankruptcy Act, sec. 23, and amendments.
Kanter v. *Cohen*, 121 Fed. Rep. 984.
In re Smith, 121 Fed. Rep. 1014.
Sharpe v. *Doyle*, 102 U.S. 686.

It is immaterial whether the purchase of the license with the plaintiff's assignor's money in the name of Long & Company, raised a resulting trust, —

Smith's Eq. p. 171, —

or whether the signing of the agreements by Long & Company for a valuable consideration raised a constructive trust.

Smith's Eq. p. 179.

In either case the defendant took the same title from the bankrupts in trust for the plaintiff's benefit, and the plaintiff is entitled to affirm the wrongful sale and recover the proceeds.

Smith's Eq. p. 186.

V.
Conclusion.

The plaintiff in error submits that not only were the federal questions seasonably raised, but that, apart from the rulings requested in the state court, the record shows that the issues in the cause could not have been determined except by determining the federal questions presented, and this is sufficient to give jurisdiction.

Chapman v. *Goodnow*, 123 U.S. 540, 548.

The action of the state court in endeavoring to dispose of the plaintiff's case by a construction incorporated in a finding of fact, does not preclude consideration by this Court.

> "It is the duty of this Court to determine for itself the proper construction of the contract upon which the plaintiff relies."
>
> *Water Power Co.* v. *Street Ry. Co.*, 172 U.S. 475, 487.

First Assignment.

The right to acquire, hold, and enjoy property is guaranteed by the fundamental law.

Comm. v. *Bacon*, 13 Bush, 214.

The right of a state to make laws regulating contracts, or, in matters of police control, to prohibit contracts, is conceded, but such laws must be enacted by the legislative and not by the judicial or executive, departments. If a legislature prohibits or imposes a penalty for making a contract the courts may declare such contracts void if they so construe the legislative will. In this case there is no

pretence of a legislative act controlling the plaintiff's contracts, which therefore must be determined by the common law, and in such cases this Court decides the common law for itself.

It is submitted that, there being no legislative prohibition, the right to make the contracts was a constitutional one, and the denial of validity to them was a deprivation of a constitutional right. This federal question was fairly raised in the first and third requests for rulings.

Second Assignment.

The material portions of the bankruptcy act are as follows: —

> "Sec. 70*a*. The trustee . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged bankrupt, . . . (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person, . . . (5) property which . . . he could by any means have transferred."

The plaintiff in error claimed that under this law of the United States the title or right to the licenses was in him, and preferred the fourth request for a ruling, which was denied.

It is clear from the evidence of the police officials that they dealt with the defendant in error as the successor to the title to the bankrupts' property; if he had been a mere stranger he would not have been considered; if the license was not property it did not pass to the bankruptcy court or its appointee, the defendant in error; and it would seem that those principles of equity, founded on honesty, which

are the theoretical cornerstones of bankruptcy jurisprudence will not permit a ruling to stand which in effect says, "this is property within the purview of the Act so that we take its value but it is not property which the man who bought and paid for it can claim or retain any ownership in whatever." In effect it is a confiscation of the property which the plaintiff in error acquired without fraud and for more than full value. At the date of the adjudication the bankrupts' title had been assigned for full value; the bankrupts retained no power over or in it except for the benefit of the plaintiff, and they could not have transferred it by any means. An equity court would have protected the rights of the plaintiff in error.

Third and Fourth Assignments.

The record shows without dispute that although the plaintiff in error was named as one of the three co-licensees on the face of the license, and paid all the money that was paid for it, yet the board of police, without notice, without charge of any violation of the conditions of the license, at an *ex parte* hearing determined that the plaintiff in error was not an owner of it, that he had no interest in it, and in March cancelled the license issued for a large and valuable consideration which did not expire until May. Having made these decisions it also decided that the privilege of naming a successor belonged to the defendant in error as the representative of the bankrupts. The plaintiff in error requested — the second ruling — that this procedure did not constitute due process of law, and was refused, yet the Court's decision is predicated upon the acts of the board of police. The plaintiff also asked the full court to rule that such powers as had been exercised by the police board as above set out, if authorized by statute of Massa-

chusetts, were repugnant to the Constitution of the United States as authorizing the impairment of contracts.

It is submitted that the license until May 1 was a contract which the police board could not cancel except for breach of conditions.

Comm. v. *Moylan*, 119 Mass. 109.

This case does not present the question as to whether the legislature might have amended the law. It is a bare question of an executive board declared by the courts to possess under the statute the power to arbitrarily terminate a contract and retain the consideration for the entire term. The $3000 which the defendant in error received was consideration predicated on his procuring the cancellation of the plaintiff's license and the procurement of a new one. Whether or not the police board had the power to make this determination, the defendant derived the fund from a breach of the bankrupts' covenants and a destruction of plaintiff's property, the plaintiff is entitled to affirm the sale and recover the proceeds, or to ask damages. In either case the recovery would be the same, no fraud being alleged in the price obtained, but such recovery would not be subject to deductions for payments made from the fund with notice of the claims of the plaintiff in error.

It would be unprofitable to take up the time of this Court discussing the construction of the contracts which are the foundation of the plaintiff's claims, if, upon consideration, this Court determines that they are valid contracts dealing with a lawful subject matter, it would seem that the first assignment of error should be sustained, as the state court denied their validity, and denied that any enforceable or protected property rights existed in them.

Equally, if they are valid contracts and not obnoxious as frauds or preferences under the bankruptcy act, the plaintiff is entitled to enforce them against the defendant, and the second assignment of error, apparently, should be sustained.

It seems to follow, too, that the power under Massachusetts law ascribed by the state court to the police board, to determine mixed questions of law and fact without appeal or review by the courts, and thereupon to forfeit and confiscate the plaintiff's rights without compensation, is a power repugnant to the United States Constitution, and the third and fourth assignments of error should be sustained.

The plaintiff in error has not felt clear whether a decree should run against the defendant as trustee in bankruptcy or as an individual. The defendant has assumed to act as a trustee and under protection of a referee's orders, but the record discloses (Exhibits 18, 19, pp. 33–38) a proceeding instituted by the defendant in error before a referee, and a denial of jurisdiction by the plaintiff in error. Nevertheless, on February 12, 1904, the referee assumed jurisdiction and made an order (Exhibit 20) from which a review was claimed (Exhibit 21) by the plaintiff in error. On the 28th day of March, 1904, the district judge reversed the referee with leave to amend pleadings and introduce further testimony. The referee had held that Tracy had no rights in the license. This was reversed (Exhibit 22); yet on a petition by the defendant in error on March 29, 1904, the referee, without further pleadings or evidence, or any notice, made the order of sale under which the defendant in error claims to have acted. (Exhibits 24, 25.) Whether this wilful action of the referee and defendant in error, in defiance of the decree of the district judge,

was such a contempt as made them liable personally rather than officially does not seem to be settled by any decision of a federal court. Both are bonded officers of the district court.

To conclude, the plaintiff submits that the Long & Company contracts conferred property rights that are protected by the United States Constitution; that the bankruptcy of Long & Company did not avoid them; that the defendant took no title to the license other than that of the bankrupts and subject to their contracts relating to it; that the defendant by his wrongful acts has put an end to the license and to all values founded thereon, and received for those acts $3000, which sum is charged with a resulting or constructive trust for the plaintiff's benefit, and the plaintiff is entitled to recover that sum from the defendant without any deduction.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 204.

ROBERT J. TRACY, PLAINTIFF IN ERROR,

v.

ALBERT A. GINZBERG, INDIVIDUALLY AND AS TRUSTEE IN BANKRUPTCY OF H. C. LONG & COMPANY.

BRIEF FOR THE DEFENDANT IN ERROR.

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BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a suit in equity brought in the Supreme Judicial Court of the Commonwealth of Massachusetts by Robert J. Tracy, the plaintiff in error, against Albert A. Ginzberg, both individually and in his capacity as trustee in bankruptcy of H. C. Long & Co., for the purpose of recovering a certain fund now held by said Ginzberg as such trustee, and alleged to be rightfully due to said Tracy.

On Dec. 23, 1902, the partnership of H. C. Long & Co. consisting of one Long and one Sanderson, entered into the hotel business in Boston, Mass. They bought certain personal property to furnish and equip their hotel from James Everard's Breweries, and also took from said breweries an assignment of the lease of the hotel. Said breweries further expended the sum of $3000 to procure a liquor license to be surrendered up and cancelled, so that a new license might be issued for the premises to be occupied by H. C. Long & Co. It was necessary that an old license should be cancelled before a new one could be issued, because the number of licenses which can be in force in Boston at any one time is limited. (Rec., p. 17.)

That said breweries, moreover, paid the city of Boston the sum of $1400, which was the regular annual license fee; and that thereupon licenses to sell intoxicating liquors for the balance of the year ending April 30, 1903, was issued by the Board of Police, which was the duly constituted licensing authority, to Long, Sanderson and the plaintiff, Robert J. Tracy, as Herman C. Long & Co. (Rec., pp. 12, 13, 29, Ex. 9–10.) Tracy was the secretary of James Everard's Breweries.

At the same time (Dec. 23, 1902) Long and Sanderson executed a paper (Rec., p. 27, Ex. 3) purporting to assign and set over to Tracy their right, title and interest in said licenses, and agreeing that thereafter they would make application for licenses for said premises in their own and Tracy's names.

In April, 1903, H. C. Long & Co. desired to renew their licenses to sell intoxicating liquors, which would expire by limitation on April 30, 1903. Accordingly, James Everard's Breweries paid for them another fee of $1400 to the city of Boston, and on May 1, 1903, the Board of Police issued new licenses for the ensuing year to Long, Sanderson and Tracy as before. (Rec., pp. 13, 29, Ex. 9–10.) Long and Sanderson gave their note to James Everard's Breweries for this loan of $1400 (Rec., p. 28, Ex. 6) and later gave another chattel mortgage (Rec., p. 28, Ex. 5) to secure the same, and Long & Sanderson also executed another paper similar to the one given Dec. 23, 1903, purporting to assign to Tracy their right, title and interest in the licenses of May 1, 1903. (Rec., p. 28, Ex. 7.) Subsequently, on July 20, 1903, both of said chattel mortgages and the note for $7500 were assigned by James Everard's Breweries to the plaintiff in error, Robert J. Tracy. (Rec., pp. 27–29, Ex. 4–8).

Long and Sanderson were adjudicated bankrupts by the District Court of the United States for the District of Massachusetts on July 23, 1903, and the defendant in error, Albert A. Ginzberg, was duly appointed trustee of their estates. (Rec., p. 13.)

Ginzberg, as trustee in bankruptcy, nominated one O'Hearn

for the vacancy in the rank of licensees, caused by Long and Sanderson's retirement from business, and recommended said Board to issue a liquor license to said O'Hearn. (Rec., pp. 20, 21.) The Board of Police granted a license to O'Hearn, who thereupon paid Ginzberg, Trustee, $3000. (Rec., pp. 20, 21.) This suit is to recover that fund of $3000.

This case was tried before a single justice of the Supreme Judicial Court of Massachusetts sitting at Boston without a jury. In reference to the custom and practice of the Police Board of Boston concerning licenses held by liquor dealers who retire from business voluntarily, or who go into bankruptcy, the Court found the following facts from the evidence, to wit: That there is a custom of said Board of Police to give a preference to a person nominated by a retiring licensee, which custom is founded on the fact that the number of licenses which can be granted in the city of Boston is limited to one thousand; that where a licensee is adjudicated a bankrupt it is the custom of the Police Board to give the same preference to the trustee of the bankrupt's estate, and they require him to stipulate, so far as he can, that the proceeds received for the nomination are to be distributed pro rata among the creditors of the bankrupt liquor dealer; that the Board does not give any preference to a person to whom the license, or right to nominate a person to fill the vacancy caused by the former licensee retiring from business, has been issued to secure a debt, even if the debt was incurred by him to pay the licensee for the license in question; that Tracy's name was on the licenses merely as security for the debts due his principal; that he was not a partner in the business; that the Board of Police gave a preference to one O'Hearn, who was nominated to said Board for the vacancy by the trustee, and the license was issued to O'Hearn, who paid the trustee for such nomination $3000. And the Court found that said fund of $3000, which was the value of such nomination, was received by the defendant for something which he had and not for anything which the plaintiff had. (Rec., pp. 25, 26.)

The licenses issued to Long, Sanderson and Tracy dated May 1, 1903 (Rec., p. 29, Ex. 9, 10), were at all times, from the bankruptcy of Long & Co. to the trial, in possession of plaintiff. (Rec., p. 30.)

Upon the foregoing facts found by the Court, the bill was dismissed. Upon an appeal to the full court, the decree of the single justice was affirmed.

JURISDICTION.

DOES THE RECORD IN THIS CASE PRESENT ANY SUCH FEDERAL QUESTION AS TO CONFER JURISDICTION ON THIS COURT TO REVIEW THE JUDGMENT OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS?

The Federal question specially set up and claimed by the plaintiff at the trial appears in certain rulings of law which he requested the trial court to make, viz: —

FIRST. That the plaintiff's right in the license issued jointly to him and to Long & Sanderson, who subsequently assigned their interest to him, was a vested property right within the meaning of Article 14 of the Constitution of the United States.

SECOND. That the Police Commission of the city of Boston is not a judicial body, and its acts in dealing with the plaintiff's rights do not constitute due process of law within the meaning of Article 14 of the Constitution of the United States.

THIRD. That the plaintiff's contract with Long & Sanderson for assignment of licenses, and that they should make no application for a renewal of the licenses except to themselves and Tracy, was a vested, a property right, and is protected by the Constitution of the United States, Article 14.

FOURTH. That the defendant, Ginzberg, as trustee in bankruptcy, is bound by the assignments and covenants of Long & Sanderson with relation to this license as fully as the bankrupts were.

These rulings the Court declined to give. (Rec., p. 25.)

It is apparent from these requests as well as from the language of the bill that the plaintiff's position is that the assignments of their liquor licenses to him by Long & Sanderson (Rec., pp. 27, 28, Ex. 3–7) vested certain property rights in him; and that by reason of the action of the Police Board in granting new licenses to a third person without the knowledge or consent of the plaintiff in error he was thereby deprived of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The foundation of the plaintiff in error's case is the instruments whereby the bankrupts undertook to assign their right, title and interest in the liquor licenses to him. (Rec., pp. 27, 28, Ex. 3–7.) The plaintiff's bill is drawn upon the theory of his supposed rights in the licenses under these assignments.

It is, therefore, plain that the question whether these assignments of the licenses conferred any rights upon or transferred any property to the plaintiff in error is a most important and vital feature of the case. This question involves the administration of the laws governing the sale of intoxicating liquors in Massachusetts.

The Commonwealth of Massachusetts has prescribed in her statutes fully and in detail the manner in which and the conditions under which the privilege of engaging in this traffic may be granted; has delegated to certain officers the power to license the business; and has charged such officers with the duty of determining the personal fitness of an applicant for a license.

Revised Laws of Massachusetts, Chapter 100, Sections 10-17, and especially Section 16, provides that "the licensing board may at any time refuse to issue a license to a person whom it considers unfit to receive the same; but the provisions of this chapter shall not be so construed as to compel said licensing board to grant licenses." Undoubtedly the purpose of the legislation was to exclude from the ranks of liquor dealers all persons who do not seem to the licensing board fit or trustworthy, after a personal investigation.

The strict conditions imposed by statute and the manifest reasons for such supervision show that a license to engage in the liquor traffic (a business which is universally regarded as hazardous to the public morals and welfare) is a purely personal privilege granted or withheld by the State in the exercise of the police power.

The Supreme Judicial Court of Massachusetts has declared such a license to be a "personal trust."

Commonwealth *v.* Hadley, 11 Met. (Mass.) 66-71.

The reasons why such a personal privilege or personal trust should not be assignable are obvious. To permit a licensee to assign his license would defeat the main object of the liquor law, which is that the business shall be confined to those who proved themselves trustworthy to the Board. We believe that it has universally been held that such licenses are not assignable in the absence of specific statutory authority.

Strahn *v.* Hamilton, 38 Ind. 57.
Alger *v.* Weston, 14 Johns. (N. Y.) 231.
Gilday *v.* Warren, 69 Conn. 237.
In Re Blumenthal, 125 Pa. St. 412.

There is no statutory authority in Massachusetts permitting licenses to be assigned.

Any attempted assignments or agreements to assign licenses are absolutely void.

Am. and Eng. Encl. of Law, 2d edition, Vol. 17, page 232, 233.

Such is also the law in Massachusetts, as decided by the Supreme Court there.

In an opinion by Chief Justice Shaw, written in 1846, it was stated that "we do not mean to intimate that one can make a general assignment of his license because the law contemplates a personal trust."

Commonwealth *v.* Hadley, 11 Met. (Mass.) 71.

In the opinion of Chief Justice Knowlton in the case of Tracy *v.* Ginzberg, written in 1905, it was stated: "A license to sell intoxicating liquors, under the R. L., Chap. 100, is a personal privilege, which may be valuable as property, in a certain sense, for the personal use of the holder, but which is not assignable or transferable by him in any way."

Tracy *v.* Ginzberg, 189 Mass. 260.

The defendant in error respectfully claims that these decisions of the Supreme Judicial Court establish conclusively a question of local law or police regulation in Massachusetts. That a State has the exclusive power to regulate or prohibit the sale of intoxicating liquors within her borders in the exercise of the police power is so well established as to make the citation of authorities well-nigh superfluous.

Beer Co. *v.* Massachusetts, 97 U. S. 25.
Crowley *v.* Christensen, 137 U. S. 86.
Giozza *v.* Tiernan, 148 U. S. 657.
Gray *v.* Connecticut, 159 U. S. 74.

The point of law involved in this case — that an assignment of a license is invalid and confers no rights upon the assignee — is an important feature of the general power to control or regulate the business. Hence the question is peculiarly one of local law which each State should have the right to finally decide for itself. This court will not assume the right to review the judgments of the court of last resort of a State where the subject involved concerns purely a matter of local or general law.

Sayward *v.* Denny, 158 U. S. 180.
Henderson Bridge Co. *v.* Henderson City, 173 U. S. 592–608.
Telluride Power Transmission Co. *v.* Rio Grande Western Ry. Co., 175 U. S. 639–647.
Same *v.* Same, 187 U. S. 569–584.
Pennsylvania R. R. Co. *v.* Hughes, 191 U. S. 477–486.

As the plaintiff in error's case rests upon assignments which he alleges conveyed to him property or property rights, but which the Supreme Court of Massachusetts decides do not, because such assignments are void, we submit that the Supreme Court should not entertain jurisdiction of the case.

THIS COURT WILL NOT REVIEW FACTS ON A WRIT OF ERROR TO A STATE COURT.

The plaintiff in error bases his contention as to the law, and consequently as to his right to recover the money in dispute, upon the facts alleged in his bill. Even upon his theory of the law, viz., that the assignments of the licenses were valid and certain property rights vested in him, he is not entitled to relief unless the facts which he alleges, and which he must necessarily prove, are found to be true. One of the most important averments of fact in his bill is in paragraph 7, viz.: "that the defendant Ginzberg with the aid and assistance of the Police Board of the city of Boston, prior to the cancellation of said license, assumed to sell the aforesaid license to some party unknown to the plaintiff for the sum of three thousand dollars, which sum he refuses to pay over to the plaintiff." (Rec., p. 4.) And again, in paragraph 9, it is averred: "and without warrant of law (defendant) has disposed of a valuable privilege belonging to the plaintiff and has procured the destruction and cancellation of the plaintiff's valuable rights." (Rec., p. 4.) The meaning and substance of these allegations are that the defendant obtained the three thousand dollars in dispute by the sale of the licenses which the plaintiff claimed to own, or by defendant's interference with and destruction of some rights plaintiff had in said licenses. This was a necessary allegation for the plaintiff to prove in the suit, because he is attempting to impress a trust upon this fund in his favor.

In order to follow the fund he must show that it was realized from property which he owned or which he was rightfully entitled to. Therefore we contend that it was absolutely essen-

tial in the plaintiff's case upon his own view of the law that he prove the facts as alleged.

The trial court on this point found that these allegations of the plaintiff were not true, and upon appeal this finding of fact was sustained. (Rec., pp. 26, 42.) It is sufficient to say that the evidence abundantly justified the facts as found by the Court. In the opinion of the full court, written by the Chief Justice, the following language is used: —

"Upon the facts shown, the Board of Police Commissioners did not consider the insertion of the plaintiff's name in the original license as affecting their right to issue new licenses. It is plain they were right as regards the licenses for the ensuing year. Whether they were right or not in regard to the plaintiff's relation to the old licenses is immaterial, *for it is plain that the money received by the defendant was not paid on account of the plaintiff's interest, but on account of what the defendant did in enabling O'Hearn to obtain the new licenses.*" (Rec., p. 42.) The language of the trial justice is as follows: "It follows that the $3000 received by the defendant was received for something which he had *and not for anything which the plaintiff had*, and the defendant is entitled to have the bill dismissed with costs." (Rec., p. 26.)

It appears, therefore, that an insuperable obstacle confronts the plaintiff in error because of the facts as found by the court below. These findings are conclusive. This court will not, upon a writ of error, review findings of fact.

Telluride Power Transmission Co. *v.* Rio Grande Ry. Co., 175 U. S. 639–647.

Turner *v.* New York, 168 U. S. 90.

Crary *v.* Devlin, 154 U. S. 619.

In Telluride Power Transmission Co. *v.* Rio Grande Western Ry. Co., 175 U. S. 639, Mr. Justice Brown said, at page 645: —

"But in order to establish any rights under the statute it was incumbent upon the defendants to prove their priority of possession, or at least to disprove priority on the part of the

plaintiff. The question who had acquired this priority of possession was not a Federal question, but a pure question of fact, upon which the decision of the State Court was conclusive."

So we submit, before any question of law can properly be considered, it should first be found from the record that the fund which the plaintiff in error is pursuing was realized from the thing which he claimed to own as he alleges.

Whether under different facts the plaintiff might possibly have acquired rights under his assignments, or whether he would have been entitled to any relief if the defendant had realized money from the licenses which had been assigned to him, becomes immaterial in view of the actual situation, to wit, that the money was *not* realized from the sale of the licenses, but purely because the trustee in bankruptcy was able to induce O'Hearn to pay him this sum of money for his (the trustee's) influence in having a new license issued to O'Hearn. The plaintiff in error cannot contend that the trustee did anything wrong in requesting the police commissioners to issue a new license to O'Hearn. We apprehend that he would hardly contend that the trustee was under any obligation — assuming, of course, for the sake of argument at all times that the assignments had any validity — to assist him to realize upon the particular licenses which he claimed to own, and, in fact, had possession of. (Rec., p. 30.) The question presented upon the hypothesis of the facts alleged in the bill is whether, if the defendant had sold the licenses for a sum of money, the plaintiff would be entitled to that sum. As that question is based on a condition contrary to the facts, it is, of course, simply a moot question; and moot questions this court has repeatedly declined to consider.

M. K. & T. R'y Co. *v.* Ferris, 179 U. S. 602.

Hamblin *v.* Western Land Co., 147 U. S. 531.

St. Joseph & Grand Island R. R. Co. *v.* Steele, 167 U. S. 659–662.

Kimball *v.* Kimball, 174 U. S. 158–161.

Due Process of Law.

The plaintiff in error claims that he was deprived of his property without due process of law. If he means that the acts of the Board of Police in cancelling the licenses and granting new licenses to fill the vacancies did not constitute due process of law, it must be that he is estopped from such a contention by his very act of bringing this suit. He thereby ratifies what he regards as an unlawful sale and seeks to recover the proceeds of that sale. If he can get this money he will be content. That is all that he is attempting to do by his suit. In other words, the fund of three thousand dollars has taken the place of the property (according to his theory), and as his right to proceed against this fund is preserved, it becomes utterly immaterial whether the Board of Police acted regularly or irregularly in revoking the licenses.

Therefore, there is presented the case of a citizen of New York (Rec., p. 2) voluntarily coming to the courts of Massachusetts to try the title of a certain fund of money. He is given a full, fair and impartial trial; he exercises his right of appeal; and now because the final judgment of the highest court of the State, whose jurisdiction he himself sought, has decided against him, he asks this court for a review because there has been no "due process of law."

It seems to the defendant in error that this attitude of the plaintiff in error is thoroughly inconsistent with the definitions and applications of the term "without due process of law," as they have been laid down by this court.

Allen *v.* Georgia, 166 U. S 138–140.
Kennard *v.* Louisiana, 92 U. S. 480–483.
Foster *v.* Kansas, 112 U. S. 201.
Gallup *v.* Schmidt, 183 U. S. 300, 307.

A party who has invoked the jurisdiction of a State court to have determined the rights which he claims, should not be

allowed to complain that his constitutional guarantees were denied him because the litigation was unsuccessful for him.

Remington Paper Co. *v.* Watson, 173 U. S. 443.
Central Land Co. *v.* Laidley, 159 U. S. 103–112.
Head *v.* Amoskeag Manufacturing Co., 113 U. S. 9–26.

THE MERE ASSERTION OF A FEDERAL QUESTION IS NOT SUFFICIENT TO CONFER JURISDICTION ON THIS COURT.

This court has often announced that it would not take jurisdiction of a case, even though the alleged Federal question was duly and properly claimed, if it appears from the record that such a claim is fictitious or entirely devoid of merit.

Millingar *v.* Hartupee, 6 Wall, 258.
Wilson *v.* North Carolina, 169 U. S. 586–595.
Hamblin *v.* Western Land Co., 147 U. S. 531.

May it not be properly suggested by the defendant in error that so far at least as the second and third assignments of error (Rec., p. 39) are concerned the rule stated applies to them?

The second assignment alleges "that there was drawn in question a title right privilege or immunity claimed under a statute of the United States, to wit, the Bankruptcy Act approved July 1, 1898, and the decision was against the title right privilege or immunity of the plaintiff in error specially set up and claimed under said statute."

The Bankruptcy Act was not considered by the Court and its construction bore no possible relation to the case. The mere fact that the defendant in error is trustee in a bankruptcy case does not imply any construction of or any title right privilege or immunity under that statute.

It has been declared that "it must appear from the record by clear and necessary intendment that the Federal question

was directly involved so that the State Court could not have given judgment without deciding it."

Saywood *v.* Denny, 158 U. S. 180.
Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 311.
New Orleans Water Works Co. *v.* Louisiana, 185 U. S. 336–344.
St. Joseph & Grand Island R. R. Co. *v.* Steele, 167 U. S. 659.
Iowa *v.* Rood, 187 U. S. 87–92.

We confidently assert that the Bankruptcy Act was not involved, either directly or indirectly, so that the State Court must have passed upon it in rendering its decision.

The third assignment of error alleges that "there was drawn in question as enforced, the validity of a statute of Massachusetts, to wit, Chapter 100, Revised Laws of Massachusetts, especially Sections 17 to 20 inclusive, on the ground of its being repugnant as enforced to Article 1, Section 10, of the Constitution of the United States, and the decision was in favor of such validity of said Chapter 100, and more especially Sections 17 to 20." (Rec., p. 39.)

The defendant in error submits that this is one of those claims to which Mr. Justice Peckham referred in New Orleans Water Works Co. *v.* Louisiana, *supra*, where he said that "there must, in addition to the simple setting up of the claim be some color therefor, or in other words, the claim must not be of such a character that its mere mention does not show it destitute of merit."

This claim was not set up in the State Court; there is nothing in the record to indicate what topic of Section 10 of Article 1 of the United States Constitution is intended to be referred to; it is not apparent to the defendant in error how or in what respect the said statute of Massachusetts conflicts with or relates in any manner to this section of the Constitution.

Both the second and third assignments of error are believed to be fictitious claims, and therefore not entitled to any consideration by this court.

Is a Liquor License Property?

We apprehend that the plaintiff in error's position in regard to this subject will be that a liquor license is property, and hence is assignable, because alienation is an inherent incident of property.

The authorities do not seem to be altogether in agreement on the question of whether a liquor license is property. Some courts have held that it is.

> Fisher *v.* Cushman, 103 Fed. 860 (C. C. A. 1st Circ.).
> Matter of Lyman, 160 N. Y. 96.

The Supreme Judicial Court of Massachusetts in this case remarked that "A liquor license may be valuable as property, *in a certain sense*, for the personal use of the holder."

> Tracy *v.* Ginzberg, 189 Mass. 260.

On the other hand, in other jurisdictions it has been flatly held that a license was in no sense property.

> Lantz *v.* Hightstown, 46 N. J. Law, 102.
> Voight *v.* Board of Excise, 59 N. J. Law, 358.
> Board of Excise *v.* Barrie, 34 N. Y. 657.
> Sprayberry *v.* Atlanta, 87 Ga. 120.

Perhaps it is fair to state that there is no general concensus of opinion upon the subject, although probably the weight is in favor of considering a liquor license as property, but only in the narrowest and most restricted sense.

There is no analogy, as may be argued, between a liquor license and a stock exchange seat, or a market license, for

example. The latter are a species of property which can be transferred.

Sparhawk *v.* Yerkes, 142 U. S. 1.
Hyde *v.* Woods, 94 U. S. 523.
Nashua Savings Bank *v.* Abbott, 181 Mass. 531.
In Re Gallagher, 16 Blatch. 410.

The essential distinction between liquor licenses and most other kinds of licenses or stock exchange seats is that the element of public policy controls the one, while it has no relation to the other.

However, it would seem to be quite immaterial whether it be decided that a liquor license is property of a purely personal, non-transferable nature or is not property at all. In either view the plaintiff in error has no case as a matter of law.

The plaintiff in error upon his pleadings is forced to one of two positions in respect to his alleged "property rights." Either his claim must be as a transferee under the assignments to him from Long and Sanderson (Rec., pp. 27, 28, Ex. 3, 7), or that his rights were those of an original licensee. Only in one or the other of those capacities can he stand before the court as the owner of property or vested rights of which he has been unconstitutionally deprived.

So far as his character as a transferee or assignee is concerned, it has been sufficiently answered. The law seems to be established beyond doubt that an assignment of a liquor license is void and confers no rights upon the assignee.

Tracy *v.* Ginzberg, 189 Mass. 260.
Commonwealth *v.* Hadley, 11 Met. (Mass.) 66.
State *v.* Bayne, 100 Wis. 35.
Heath *v.* State, 105 Ind. 342.

If, on the other hand, he rests his case upon his supposed constitutional rights as a licensee, because his name was inserted in the licenses, the answer is that the holder of a license

acquires thereby no rights, privileges or immunities within the meaning of the Fourteenth Amendment; nor does the revocation of a license amount to a deprivation of property under that amendment.

A liquor license, of course, only purports to grant to the holder the privilege of conducting for a limited period of time what would otherwise be an unlawful business. The very most that Tracy could have claimed as of right was that he was permitted to engage in the liquor trade in the city of Boston.

That privilege is the only "right" which he can fairly and reasonably assert that he acquired as a *direct licensee.*

Now, it has been decided that the permission to sell intoxicating liquor is not a "right or a privilege" within the meaning of the Fourteenth Amendment of the Federal Constitution.

> Crowley *v.* Christensen, 137 U. S. 86.
> Giozza *v.* Tiernan, 148 U. S. 657.
> Bartemeyer *v.* Iowa, 18 Wall, 129.

A license is not a contract and confers no contractual rights upon the holder.

> Calder *v.* Kurby, 5 Gray (Mass.), 597.
> Le Croix *v.* County Commissioners, 50 Conn. 321.
> Board of Excise *v.* Barrie, 34 N. Y. 657.
> Sprayberry *v.* Atlanta, 87 Ga. 120.
> Stone *v.* Mississippi, 101 U. S. 814–820.

And it has accordingly been held that the revocation of a license does not constitute taking of property without due process of law.

> Board of Excise *v.* Barrie, 34 N. Y. 657.
> Sprayberry *v.* Atlanta, 87 Ga. 120.
> Schwuchow *v.* Chicago, 68 Ill. 444.

The authorities cited are sufficient to show that plaintiff in error is entirely mistaken when he avers in his bill as a matter

of law that the licenses or the attempted assignments to him from the bankrupts gave him any *vested rights* or *property* at all in the constitutional sense.

It may be added that it appeared to the Court that Tracy was not a partner in the business; that his name was put in the license merely in an attempt to secure a debt in violation of a well-known rule of the Board of Police (Rec., pp. 23, 40); and that he was a citizen of New York. (Rec., p. 2.) The authorities might well have found that he was not a *bona fide* licensee and that they had been imposed upon when they issued licenses to Long, Sanderson & Tracy as Herman C. Long & Co. (Rec., p. 29, Ex. 9.) If he was guilty of practising a fraud upon the licensing board, whereby he secured the insertion of his name as a nominal licensee, he ought not to have a right to invoke any constitutional protection in the premises.

THE FUND IS ASSETS OF THE BANKRUPT'S ESTATE.

The fund of $3000 is rightfully held by the trustee in bankruptcy as assets of the estate of H. C. Long & Co. It does not lie in the mouth of plaintiff in error to assert that this money is not properly assets of the estate nor to accuse the defendant in error of being an intermeddler if he fails to prove a better title to the money.

It has moreover been held in similar cases that money realized from the nomination for a license is assets of a bankrupt estate.

In re Fisher, 98 Fed. Rep. 89 (D. C. Mass.).
Fisher *v.* Cushman, 103 Fed. Rep. 860 (C. C. A.).
In re McArdle, 126 Fed. Rep. 440 (D. C. Mass.).

The United States Bankruptcy Act of 1898, in enumerating those things which pass to the trustee under Section 70-a 3, includes "powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person."

Had Long & Co. not gone into bankruptcy, but had they voluntarily retired from business, surely the privilege of nominating their successor was "a power which they might have used for their own benefit." If through the courtesy of the Police Board their trustee is extended the same privilege, he is in duty bound to exercise that privilege as such trustee and to account to the Bankruptcy Court for any money he receives because of that privilege. Upon authority and reason he did his duty in availing himself of the situation to acquire a substantial sum for the creditors. His duty was to the creditors of the estate to act in the manner in which he did; he owed no duty to the plaintiff in error to refrain from acting. If the plaintiff in error was a *bona fide* licensee he might have gone to the Board of Police and nominated a candidate himself.

The record does not show that he made any attempt to do so.

If his complaint is simply that the Board of Police wrongfully cancelled his licenses, his complaint should be against them, not against defendant in error.

In conclusion, we most respectfully submit that both upon the ground of want of jurisdiction, and upon a consideration of the merits of the case, the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

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Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 204.—October Term, 1906.

Robert J. Tracy, Plaintiff in Error, *vs.* Albert A. Ginzberg, individually and as Trustee in Bankruptcy of H. C. Long & Company.	In error to the Supreme Judicial Court of the State of Massachusetts.

[March 18th 1907.]

Mr. Justice Harlan delivered the opinion of the Court.

This suit was instituted in the Supreme Judicial Court of Massachusetts by the plaintiff in error, a citizen of New York, against the defendant in error, a citizen of Massachusetts, individually and as trustee to H. C. Long & Company composed of H. C. Long and Frank A. Sanderson.

The case made by the bill of complaint is as follows: On the 23d of December 1902 the plaintiff sold to Long and Sanderson the personal property used in carrying on hotel business at a certain place in Boston, and assigned to them the lease of the realty occupied by the hotel. As partial payment therefor he took back a mortgage on the personal property for the sum of $7,500, running to the James Everard's Breweries, a corporation of New York. The mortgage covered not only a part of the purchase price, but also $3,000 in cash, which the plaintiff paid for the liquor license, which, on or about the above date, he procured to be assigned to Long and Sanderson and to himself, as joint owners, and also the sum of $1,400 in cash, which the plaintiff paid to the city of Boston as a fee for the liquor license issued by the board of police of that city to Long and Sanderson and to the plaintiff. That license expired by limitation on May 1st 1903.

In consideration of the advance, by plaintiff's procurement, of the above sums of $3,000 and $1,400, Long and Sanderson, on the above date, by writing, assigned their right, title and interest in said license to the plaintiff, covenanting and agreeing that all future applications for renewals of the license should be in the names of Long and Sanderson and the plaintiff, and that upon such renewal being granted they would assign, transfer and set over any such license.

Long and Sanderson being without money for the purpose, the plaintiff paid $1,400 to the city as the renewal fee, and thereupon a new first and

fourth class license was issued by the board of police to Long and Sanderson and the plaintiff to sell intoxicating liquors in the said hotel building. This license was taken by the plaintiff into his possession, and he had it in his possession at the bringing of this suit.

On the payment of the license fee for 1903–4 Long and Sanderson, by an instrument of writing dated April 24th 1903, assigned, transferred and set over to the plaintiff their interest in that license, and further agreed to assign and set over to him their interest in any renewal of the license so long as they should be indebted to James Everard's Breweries. The plaintiff alleged that that assignment was for present and valuable consideration, and that by reason thereof he became the sole owner of the license.

Lord and Sanderson were adjudged bankrupts on the 23d of July 1903, being at the time indebted, and are still indebted, to James Everard's Breweries in a sum exceeding $7,000.

The number of first and fourth class licenses in Boston is limited by law and are substantially all issued each year, so that a new license cannot be issued until an old license is cancelled. Old licenses are of great value to persons who desire to engage in the liquor business in Boston. They sell from $3,000 to $5,000 to persons who present them for cancellation together with an application for a new license to themselves.

Because of the large surrender value of old licenses and of the long-continued custom of reissuing licenses to old holders until refused for cause, such licenses have been recognized by courts of Massachusetts as property rights, and the powers of the board of police in dealing with them have been limited to the exercise of the sound discretion within the limits established by the laws of the Commonwealth.

The defendant Ginzberg, having full knowledge of the above facts, procured the board of police, on or about the 1st of April 1904, to cancel the plaintiff's license. This was done without notice to plaintiff or hearing on any charge of the violation of the terms of the license. With the assistance of the police board, prior to the cancellation of the license, Ginzberg sold the license for $3,000, which he refused to pay over to the plaintiff. He also collected from the city the sum of $200 as a rebate upon the plaintiff's license, and refused to account for any sum to the plaintiff whatever. In the matter complained of Ginzberg acted beyond his powers as trustee of the bankrupt estate and without warrant of law disposed of [to one O'Hearn] a valuable privilege belonging to the plaintiff, and has procured the destruction and cancellation of the plaintiff's valuable rights.

The relief prayed was that the title of the plaintiff to the first and fourth class liquor license issued to Long and Sanderson and himself be established; that Ginzberg be ordered to account for the sums received by him as the proceeds of the plaintiff's license and be required to pay the

same over to plaintiff; that the plaintiff's losses and damages by reason of the acts of defendant be established, and that he be ordered to pay the same; that execution issue against Ginzberg, individually, for such sums as may be found due to the plaintiff by reason of his wrongful interference with plaintiff's property; that if upon hearing it should appear that defendant acted within his duties as trustee of the bankrupt estate, that the decree run against him as such trustee but without execution thereon; and that the plaintiff have such other and further relief as may be just.

Such is the case made by the bill. After answer and replication the evidence was taken by a special commissioner, to be reported to the full court. In its finding of facts the court said: "In the case at bar, the police commissioners were satisfied that the name of Tracy was inserted in the two licenses to secure to his principal the debt, or part of the debt, due from the defendants Long & Sanderson; that he was not a partner in the liquor business, and for that reason the police commissioners gave a preference to O'Hearn, who was nominated by the trustee in bankruptcy, with[out] the consent, or against the objections, of Tracy, in deciding to whom a license should be issued on the vacancy caused by Long & Sanderson going out of business. The trustee received three thousand dollars for the nomination by him, and I find that it is, in fact, the value of such a nomination. It follows that the three thousand dollars received by the defendant was received for something which he had, and not for anything which the plaintiff had, and the defendant is entitled to have the bill dismissed with costs." By the final decree the bill was dismissed and the case carried before the full court, which affirmed the decree of the trial court.

The Supreme Judicial Court of Massachusetts affirmed the judgment, holding that to sell intoxicating liquor was a personal privilege, valuable as property, in a certain sense, for the personal use of the holder but not assignable or transferable by him in any way; and that "the value of the release is recognized as depending wholly upon the practice of the police commissioners, and because there is no legal right to assign the privileges of such a license, and the police commissioners refuse to be bound by assignments, or to recognize at all assignments for security, the court holds that a holder of an assignment for security has no rights under the assignment." Further: "In the present case the release or assignment of the licenses by the bankrupts to one who wishes to obtain licenses for the next year, induced him to pay the trustee in bankruptcy three thousand dollars. The money so received was not for any property owned by the plaintiff. It was for a position before the police commissions, from which the payor had reasonable ground to expect their favorable action. The plaintiff could not control this

position, or do anything that would induce the payment by O'Hearn of the money which the defendant received. Upon the facts shown, the board of police commissioners did not consider the insertion of the plaintiff's name in the original license as affecting their right to issue new licenses. It is plain that they were right as regards the licenses for the ensuing year. Whether they were right or not in regard to the plaintiff's relation to the old licenses is immaterial, for it is plain that the money received by the defendant was not paid on account of the plaintiff's interest, but on account of what the defendant did in enabling O'Hearn to obtain the new licenses." *Tracy* v. *Ginzberg*, 189 *Mass.* 260.

The plaintiff insists that the action of the police commissioners deprived him of property without due process of law. The answer to this contention is that the expectation called a right or property was of the board's creation and therefore subject to the limitations which the board imposed.

The plaintiff also insists that by the judgment of the Supreme Judicial Court of Massachusetts he has been deprived of his property without the due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States. This proposition is without merit. Within the meaning of that Amendment, the court, by its judgment, did not deprive the plaintiff of property without due process of law. He sought a decree adjudging that he was entitled to the money received by Ginzberg from O'Hearn. The court, proceeding entirely upon principles of general and local law, and giving all parties interested in the question an opportunity to be heard, decided that plaintiff had no right to that money. The decision of a State court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy—upon which question we express no opinion—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property without due process of law. Under the opposite view every judgment of a State court, involving merely the ownership of property, could be brought here for review—a result not to be thought of. The Fourteenth Amendment did not impair the authority of the States, by their judicial tribunals, and according to its settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution, or by any valid act

of Congress, or by any treaty. Within the meaning of that Amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power, inconsistent with "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Bank of Columbia* v. *Okely*, 4 *Wheat.* 235, 244; *Murray's Lessee* v. *Hoboken &c.*, 18 *How.* 272. It cannot be said that the State court in this case, by its final judgment, departed from those usages or modes of proceeding.

The judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.